(29,838)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 528

WILLIAM M. BARRETT, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY, PETITIONER,

vs.

ARTHUR H. VAN PELT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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[fol. 1] **SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT**

ARTHUR H. VAN PELT, Plaintiff,

against

WILLIAM M. BARRETT, as President of the Adams Express Company, Inc., Defendant.

STATEMENT UNDER THE RULE

This is an action to recover the sum of Two thousand eight hundred forty-seven and 15/100 Dollars ($2,847.15) for alleged damage to a shipment of 522 cases of fresh eggs alleged to have been shipped by The Kentucky Creameries, City of Louisville, Kentucky, to Harold L. Brown Company, New York City, on the 23rd day of February, 1918.

The action was commenced by the issuance of a summons on the 1st day of March, 1920, and the voluntary appearance of the defendant on the 3rd day of March, 1920. On the 4th day of April, 1920, complaint was served. Issue was joined by the filing of a verified answer on the 10th day of May, 1920. The case was tried before Mr. Justice William P. Burr, sitting with a jury, on the 19th and 22nd days of May, 1922, and the court directed the jury to find a verdict in favor of the plaintiff for the sum of $3,396.26. Motion [fol. 2] was made for a new trial on the grounds that the verdict was excessive. The court then reserved decision and briefs were to be submitted. On the 29th day of June, 1922 judgment was rendered for the plaintiff in the sum of $3,396.26 and judgment in the sum of $3,545.65 was entered herein in favor of the plaintiff and against the defendant, in the office of the Clerk of the Supreme Court of the State of New York, New York County, on the 17th day of July, 1922. From said judgment, the defendant herein takes this appeal.

There has been no change of parties or attorneys herein.

SUPREME COURT, NEW YORK COUNTY

[Title omitted]

NOTICE OF APPEAL

Please take notice that the defendant, William M. Barrett, as President of the Adams Express Company, hereby appeals to the Supreme Court of the State of New York, Appellate Division, for the first De- [fol. 3] partment, from the judgment entered herein in the office of the Clerk of the County of New York, in favor of the plaintiff and against said defendant, William M. Barrett, as President of the Adams Express Company, for the sum of Three thousand three hundred ninety-six dollars and twenty-six cents ($-,396.26), together

with One hundred forty-nine dollars and thirty-nine cents ($149.39) costs, on or about the 17th day of July, 1922, and from an order made and entered in said Clerk's office on or about the 29th day of June, 1922, denying the said defendant's motion to set aside the verdict herein and for a new trial, and that this appeal is from the whole of said judgment and of said order and from each and every part thereof.

Dated, New York, July 18, 1922.

Stockton & Stockton, Attorneys for Defendant. Office & P. O. Address 2 Rector Street, Borough of Manhattan, City of New York. To Lamar Hardy, Attorney for Plaintiff. Office & P. O. Address, 149 Broadway, Borough of Manhattan, City of New York.

[fol. 4] NEW YORK SUPREME COURT, COUNTY OF NEW YORK

[Title omitted]

SUMMONS

To the above named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer Judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, March 1st, 1920.

Lamar Hardy, Plaintiff's Attorney. Office and Post Office Address, 149 Broadway, Borough of Manhattan, New York City, N. Y.

[fol. 5] SUPREME COURT, NEW YORK COUNTY

[Title omitted]

COMPLAINT

The plaintiff herein by Lamar Hardy, his attorney, complaining of the defendant, alleges as follows:

First. Upon information and belief, that the defendant, William M. Barrett, at all the times hereinafter mentioned was and still is the President of the Adams Express Company, an unincorporated asso-

ciation, consisting of seven or more persons, and the said association was and is duly created and existing under and by virtue of the laws of the State of New York.

Second. Upon information and belief that the said Adams Express Company at all the times hereinafter mentioned was and still is a common carrier for hire engaged in inter-state commerce throughout the United States, and as such common carrier was and still is subject to the Acts of Congress in relation to common carriers engaged in inter-state commerce.

Third. Upon information and belief, that on or about February [fol. 6] 23, 1918, Armour and Company, Inc., a Kentucky corporation engaged in business in the City of Louisville, State of Kentucky, as The Kentucky Creameries, tendered to the said Express Company for shipment and transportation from the said City of Louisville, Kentucky, to the Harold L. Brown Company, New York City, New York, a car consisting of 522 cases of fresh eggs, a perishable food product.

Fourth. Upon information and belief that the said Express Company then and there accepted for shipment and transportation the said car of eggs, and the said Express Company then and there for a valuable consideration promised and agreed safely, expeditiously and without unreasonable delay to deliver said car of eggs to the said Harold L. Brown Company in the said City of New York.

Fifth. Upon information and belief that the said Express Company did not ship and transport said car of eggs with reasonable promptness and dispatch but delayed the shipment and delivery of the same and the said eggs were not delivered to the said consignee in the City of New York until March 4th, 1918.

Sixth. Upon information and belief that by reason of the delay of the said Express Company in shipping and delivering the car of eggs as aforesaid, said eggs were damaged in shipment and deteriorated in quality and value, and the defendant was hereafter duly notified of said delay in shipment and the damage resulting therefrom.

[fol. 7] Seventh. That after delivery of said eggs and prior to the commencement of this action, said Armour and Company, Inc., for a valuable consideration and by an instrument in writing, duly assigned to plaintiff herein any and all claims and rights of action arising out of the facts herein set forth and the plaintiff is now the owner of all claims and rights of action arising out of the facts herein alleged.

Eighth. That by reason of the foregoing the plaintiff became and is entitled to receive from the defendant the sum of Two thousand eight hundred forty-seven and 15/100 Dollars ($2,847.15), no part of which has been paid, although duly demanded.

Wherefore, plaintiff demands judgment in the sum of Two thousand eight hundred forty-seven and 15/100 Dollars ($2,847.15), with interest from March 4th, 1918, together with the costs and disbursements of this action.

Lamar Hardy, Attorney for Plaintiff. Office and Post Office Address, 149 Broadway, Borough of Manhattan, New York City, N. Y.

Affidavit of A. H. Van Pelt to above paper omitted in printing.

[fol. 8] SUPREME COURT, NEW YORK COUNTY

[Title omitted]

ANSWER

The defendant, William M. Barrett, as President of the Adams Express Company, wrongfully sued as William M. Barrett, as President of the Adams Express Company, Inc., answering the complaint herein by Stockton & Stockton, his attorneys, herein:

[fol. 9] 1. Denies that the Adams Express Company still is a common carrier for hire as alleged in paragraph designated Second of the Complaint.

2. Denies that he has any knowledge or information thereof sufficient to form a belief as to any of the allegations contained in paragraphs designated Third, Fourth, Fifth, Sixth, Seventh and Eighth of the complaint.

For a separate and partial defense:

3. Alleges on information and belief that whatever property was delivered to Adams Express Company at the time and place set out in the complaint was delivered to and received by said express company only under and pursuant to, and subject to the terms and conditions of, a special contract in writing for the carriage of the same made and entered into at the time and place of said delivery by and between said express company and the person delivering said property to it for shipment and by such person accepted and received.

4. Alleges on information and belief that the terms and conditions of said special contract in writing were, at and prior to the date mentioned in the complaint herein, duly established, filed, posted and published by said express company as a part of its official express classification, as required, directed and authorized by the provisions of an act of Congress entitled An Act to regulate Commerce approved February 4, 1887, and the various acts amendatory thereof and sup- [fol. 10] plemental thereto, and by the orders of the Interstate Commerce Commission duly made in pursuance and by virtue of said Act to Regulate Commerce and the various acts amendatory thereof and supplemental thereto.

5. Alleges on information and belief that in and by the terms of said special contract in writing it was, among other things, provided and agreed that the value of said property was not more than fifty dollars ($50) or fifty (50) cents per pound, and that said express company should in no event be liable for more than the value so placed upon said property, namely, the sum of fifty dollars ($50) or fifty (50) cents per pound.

6. Alleges on information and belief that the person by whom said property was delivered to said express company as aforesaid wilfully and fraudulently neglected and refused to state, if such were the fact, that the value of said property was greater than fifty dollars ($50) or fifty (50) cents per pound, but wilfully and fraudulently concealed the same and represented to said express company that the value of said property was not more than fifty dollars ($50) or fifty (50) cents per pound; that said express company in good faith, relying upon said representation as to the value of said property, regulated and fixed its charges for the transportation thereof in accordance with the value thereof as represented to it by the person by whom said property was delivered to it for transportation and in accordance with its schedules of charges for the transportation of property in interstate commerce between different points on its own route and between points on its own route and points on the routes of other carriers; that said schedules had been and were prior [fol. 11] to and at the time of the delivery of said property to said express company as aforesaid, duly established, filed, posted and published by it as required by the provisions of an act of Congress entitled An Act to Regulate Commerce approved February 4, 1887, and the various acts amendatory thereof and supplemental thereto; and that, by means of said concealment and said representation on the part of the person so delivering said property to said express company, the shipper thereof knowingly, wilfully, intentionally and fraudulently obtained from said express company, and said express company made a lower charge for the transportation thereof than said express company would have been entitled to make and would have made, under its said schedule of charges, if the value of said property as now alleged in the complaint had been declared and represented to said express company at the time of the delivery of said property to it for transportation and stated in said special contract in writing.

For a separate and complete defense:

6. Repeats and realleges each and every of the allegations contained in paragraphs designated 3 and 4 of this answer with the same force and effect as though herein set forth at length.

7. Alleges on information and belief that in and by the terms of said special contract in writing and of said official express classification it was, among other things, provided and agreed that said express company should not be liable in any suit to recover for the loss, damage or delay of said property unless the same should be instituted [fol. 12] within two years after delivery, or in case of failure to de-

liver within two years after a reasonable time for the delivery had elapsed; and that this action was not instituted within two years after the delivery of the property mentioned in said cause of action or within two years after a reasonable time for the delivery thereof had elapsed.

Wherefore, defendant demands judgment, dismissing the complaint herein with costs.

Stockton & Stockton, Attorneys for Defendant, 2 Rector Street, New York City.

Affidavit of Wm. M. Barrett to above omitted in printing.

[fol. 13] SUPREME COURT OF NEW YORK

[Title omitted]

EXTRACT FROM CLERK'S MINUTES

July 28th, 1922.

I hereby certify that this cause was tried before Hon. William P. Burr and a jury on the 19th and 22nd days of May, 1922, and a verdict rendered therein by direction of the Court for the plaintiff for the sum of $3,396.26. Defendant moved for a new trial under the Civil Practice Act. No. 549. Decision reserved. On June 26, 1922. Motion denied.

James A. Donegan, Clerk.

[fol. 14] SUPREME COURT, NEW YORK COUNTY

[Title omitted]

JUDGMENT

The issues in this action having been duly brought on for trial before Mr. Justice William P. Burr and a jury at Trial Term, Part IX, of this Court, held on the 19th and 22nd days of June, 1922, at the County Court House, New York County, Borough of Manhattan, City of New York, and the issues having been duly tried and the Court having directed the jury to render a verdict against the defendant after a fair trial of the issues in this action, in the sum of $3,396.26, and the costs of the plaintiff having been taxed as against the defendant in the sum of $149.39;

Now, on motion of Lamar Hardy, attorney for the plaintiff, it is

Adjudged that the plaintiff have judgment against the defendant Adams Express Company upon the issues in this action in the sum of $3,396.26; and it is

[fol. 15] Further adjudged that the plaintiff have costs against the defendant in the sum of $149.39, amounting in all to $3,545.65, and that the plaintiff have execution against the defendant for the respective amount- recovered against it as aforestated.

Judgment this 7th day of July, 1922.

James A. Donegan, Clerk.

At a Trial Term of the Supreme Court Held in and for the County of New York, at Part IX Thereof, at the County Court House, in the City of New York, Borough of Manhattan, on the 29th Day of June, 1922.

[Title omitted]

Order Denying Motion for New Trial

The issues in this action having duly come on for trial and having been tried on the 19th and 22nd days of May, 1922, before the Court [fol. 16] and a jury, and the Court having directed a verdict for the plaintiff in the sum of Three thousand Three hundred and ninety-six and 26/100 ($3,396.26) Dollars; and the Justice presiding at the trial aforesaid having, at the same Term, and immediately after the rendition of the said verdict, entertained a motion on his minutes on behalf of the defendant to set aside the verdict and for a new trial upon the exceptions taken by the defendant at the trial, and because the verdict is contrary to the evidence and contrary to law, and on the ground that plaintiff had failed to file a claim with the Express Company within four months after the goods were delivered, and the Court having reserved decision on said motion,

Now, after hearing Kenneth E. Stockton, Esq., of counsel for defendant in favor of said motion and Louis C. White, of counsel for the plaintiff, in opposition thereto, and due deliberation having been had thereon it is

Ordered, that said motion be and the same is hereby in all respects denied.

W. P. B., Justice of the Supreme Court.

[fol. 17] Supreme Court, New York County

[Title omitted]

Case and Exceptions

Friday, May 19, 1922—at 10:00 o'clock a. m.

Appearances: For Plaintiff, Lamar Hardy, Esq., Attorney, Louis C. White, Esq., of Counsel; for Defendant, Stockton & Stockton, Esqrs., Attorneys, K. E. Stockton, Esq., of Counsel.

A jury was duly empaneled and sworn.

Mr. Stockton: Your Honor, in this case, the plaintiff is going to offer a deposition, which I am going to be compelled to move to suppress. I do not know whether you would prefer I make that motion now or waited until the deposition was actually offered.

The Court: We will open up first.

[fol. 18] Mr. White: Your Honor, on that point I want to say this: I have been served simply with a notice, no affidavit, showing that such a motion would be made. There are two objections to that. First of all, this deposition was filed at least over ten days ago, and the proper place to make that motion is Special Term on affidavits.

The Court: It seems to me under the rule that the motion is contemplated to be made at the Special Term on notice.

Mr. Stockton: It is on notice, yes, your Honor. Such a thing would naturally be required, but I do not think it necessarily contemplates a motion.

The Court: How is the Court to pass upon a motion of this kind without the facts alleged upon which you base it?

Mr. Stockton: Exactly; that is why I thought it would be peculiarly the province of the Court to do it on the trial, because then it is up to me to produce my witnesses who claim that it is unfair, and it is not on any question of hearsay. That is why I thought it would be better on the trial than it would be by affidavits at Special Term, because you will have the witnesses right before you.

Mr. White: My first objection is purely technical. The jury is here, and it is intended for them to try a case. If he has got a motion, he should have brought it up in Special Term. Secondly, the statement that there was any unfairness here is absolutely untrue, and if there was any unfairness, it was the attempt on the other part to be unfair. They brought a motion to have this man cross examined. They did not offer to pay the expenses to bring him [fol. 19] back and have him cross examined. I opposed it, and I submitted affidavits. If your Honor wants to hear this motion, I am perfectly willing the jury should be excused for five minutes, and we will go into the merits of it, but I say, as I understand the law, after this deposition having been downstairs for over five days filed in the Clerk's office, the proper place to have brought this motion——

The Court: How can I consider the motion on statements that are involved and contradicted by the other side? That is what I want to know.

Mr. Stockton: No, sir; I would have Mr. Slaughter——

The Court: As I understand your application, it is to suppress the deposition because of the irregularities in the taking.

Mr. Stockton: No, sir; not in the taking, because it is Rule 113, but because it is unfair.

The Court: Rule 113?

Mr. Stockton: Of the Civil Practice Act.

The Court: Rule 133.

Mr. Stockton: I guess it is 133.

The Court: Rule 133 provides that when deposition taken without the state may be suppressed. It is under that.

Mr. Stockton: Yes, sir.

The Court: If a deposition taken without the state has been improperly or irregularly taken or returned, or the attorney for either party has practiced any fraud or unfair or overreaching conduct in respect of such deposition, an order for the suppression of the deposition may be made by the Court on the application of the party aggrieved after notice to the adverse party. If it appear that a [fol. 20] resident of the state whose deposition was taken without the State, ordinarily could have been subpœnaed to attend the trial, his deposition may be suppressed. That undoubtedly took place, that you give notice to the other side.

Mr. Stockton: A notice has been given.

The Court: Of your intention to move at the Court.

Mr. Stockton: I gave such notice.

The Court: That you would move to suppress, and the reasons.

Mr. Stockton. I gave such notice on the ground that it was unfair.

Mr. White: There is no affidavit, your Honor, supporting this, but I am perfectly willing to go into the merits, and the strange thing about it is, that every time we come into Court, we have got a different counsel, and the last time we were in Court, counsel for my friend stated that they did not make any such claim. He simply said that there has been a misunderstanding by that gentleman who was here and argued the case before.

Mr. Stockton: I will say now that I would hesitate very greatly to accuse another counsel of fraudulent conduct or——

The Court: Do you want to make the motion now?

Mr. Stockton: Yes, sir; I do.

The Court: And you want to answer it now. You want to argue against it now?

Mr. White: If your Honor is going to entertain that motion.

The Court: I cannot know whether I will entertain it or not until I know all the particulars about it. We will excuse the jury for ten minutes.

[fol. 21] (The jury then left the court room.)

Mr. Stockton: I will now put Mr. Slaughter on the stand.

Mr. White: Your Honor, we should have an affidavit setting up the facts as to what they claim there was any unfairness about this.

Mr. Stockton: There is an affidavit on the sworn statement of a witness, and Mr. Slaughter, I will put him on the stand.

The Court: I do not quite understand this practice in this way. You apparently move or are about to move to suppress this deposition on certain grounds.

Mr. Stockton: Yes, sir.

The Court: And to support that motion, you propose to state certain facts and to bolster that statement up with evidence.

Mr. Stockton: Yes, sir, that is it.

The Court: The question with me is, how does that comply with the requirement of Rule 133? Suppose he says that if you have

acquainted him with the particulars of what you claim, he would have had witnesses here to rebut; but he has no witnesses here to rebut those very things that you are now about to prove or undertaking to prove with regard to this deposition.

Mr. Stockton: I see your point, sir.

The Court: You have not acquainted him with the grounds upon which you intend to move to suppress this deposition, and this rule apparently contemplates that you shall give notice to the other side, and upon that notice and the grounds stated in that notice and the facts stated, he must meet your application to suppress the deposition. You call a witness here, and the witness testifies with regard to cer-
[fol. 22] tain facts. He says that he is absolutely satisfied that that is untrue, but he has not the witnesses here to disprove that: what will I do then?

Mr. Stockton: I do not think he will say that.

The Court: I do not know. Wait a moment. I do not know.

Mr. Stockton: I see your point. As a matter of fact, we made the motion to suppress—not to suppress the deposition, but to compel the plaintiff's witness—we had no opportunity to appear and cross examine, that is our claim, on this deposition. What we claim is, that we were taken completely unawares. I do not know whether I would say that the plaintiff's conduct is unfair, or it has worked an unfairness to us, but his conduct, whether legally and technically correct or not, I think has worked an unfairness to us, because we had no cross examination of the witness whose deposition was taken at all. We made a motion in Special Term to have the Court compel the witness to appear for cross examination, or stay the trial of the action, and the Court denied that, as I remember saying that the motion should be made to suppress the deposition. I examined that feature of the Code, the rules of practice, and they did not seem to indicate that the motion had to be made at Special Term. I think it can be made at the trial.

The Court: The motion is in two branches. One is, that it may be made if the deposition taken without the state has been improperly or irregularly taken or returned. The other is, "Or the attorney for either party has practiced any fraud or unfair or over-reaching conduct in respect of such deposition."

[fol. 23] Mr. Stockton: Yes, sir. We do not claim any fraud or over-reaching, as I understand the word "overreaching," but we do claim that his conduct was unfair. As I understand, that involves something with no deceit or anything, but that he takes advantage—what we claim is, that he took advantage of a misunderstanding.

The Court: How about the general statement? What have you got to say about it?

Mr. White: Your Honor, the facts are these: We called up the other side, my friend's firm, and said to him, we desired to take a deposition in Louisville, Kentucky, will you stipulate a day satisfactory to you when we may take this deposition? They said, we will stipulate nothing unless you will agree that in case you get a verdict you will deduct the cost of taking these depositions from your taxed cost. That was absolutely unfair, and we told them we

would not do that. We served them with eight days' notice that this deposition was going to be taken. That is all the Code requires. It says a reasonable time. Five days really are all that is necessary. They had a perfect right to go into Court and make a motion, if they wanted to, to have that deposition postponed till some future day. The witness was in Springfield, Missouri, which is three or four or five hundred miles from Louisville. The witness had started from Springfield for Louisville. Counsel had started from Chicago for Louisville to take this deposition when the other side called up and said to me, "Do you mind adjourning the taking of that deposition?" I said "You should have told me about this two or three days ago. I had no objection to postpone it, but I want the [fol. 24] deposition, because this case is on the calendar but," I said, "I think it is too late now. I will try and see if I can stop them by telegraph." I told them that it was too late; they had started. I said to my friend, "I will telegraph." He said, "I don't think that is necessary at all. We are going to have somebody appear down there and ask to have it adjourned." That would have involved us in hundreds of dollars of expense to bring that witness back. I do not know whether because the Derby was going on in Louisville last Saturday that they thought they would like to be there or not, but they did not do anything. This deposition has been taken strictly in accordance with the Code, with the rules, and there is absolutely no justification for this application.

Mr. Stockton: Your Honor, whatever the technical objections might be to this, I think certainly now I am entitled to have Mr. Slaughter state his side of the case.

Mr. Slaughter: I am the man who actually handled the case in connection with the defendant's attorney's office, and the man to whom Mr. White referred a moment ago. The case was on the calendar first on April 6th. When it appeared on the calendar, I received a phone call from the office of the attorney for the plaintiff, requesting that it be adjourned, that the case be adjourned in order that they might take this deposition in Louisville.

Mr. White: Your Honor, that is not true.

Mr. Slaughter: I do not say that it was Mr. White. I say that it was a man from his office called me. This is not under oath, and I do not understand that your Honor is passing on it. I am making a statement as to what actually occurred.

[fol. 25] The Court: But it is quite apparent that there is an issue of fact raised here at once with regard to what you say.

Mr. Slaughter: Just a moment, if you please, sir. At that time I agreed; I said that the case had been an issue for two years, pretty late, but I said, "All right; draw up the order." The case was actually adjourned on April 15th. It stayed on the calendar until that time. It was adjourned till the May Term. Then I was called on the phone by someone from the office, and he wanted to know if I knew a Notary Public in Louisville, or whether or not they could learn the name of a notary themselves and fix the time and place of taking. At that time I said this testimony ought to be taken in the form of interrogatories; there is no reason why we should be put to

the expense of procuring an attorney to represent us in Louisville at this late date. Later in that same conversation I recalled the fact that I was going to be in Louisville myself on the 6th day of May, and I said at the close of that conversation that if he would fix the taking for the 6th day of May, we will agree to take it on oral interrogatories. That was perfectly agreeable to whoever was doing the talking from that end of the line. That was the second conversation which was had. It went on until some time I believe about the 19th or 20th of April. This notice was then served, and the testimony as shown in the notice was to be upon the 29th. I then called the office. I did not speak to Mr. White at that time. I called the office of the plaintiff's attorneys, and recalled that conversation to him, telling them that unless the testimony could be taken upon the 6th day of [fol. 26] May, we wanted it upon written interrogatories. They said they thought it was all right then; they assured me that it would be taken upon May 6th. Upon April 26th, it was—that was three days before the taking—I had not heard anything from them. I called them. I talked to Mr. White at that time, I believe. I am not sure about it. Of course I cannot tell who was on the other end of the wire. They said it was Mr. Hardy's office, and I asked them about the adjournment of the taking of the testimony. They still said that they thought it would be too late, although they said at that time a Mr. Blanchard, a Chicago attorney, was going to be in Louisville upon the 29th day of April and expected to take it. I told him that that was not in accordance with the previous agreement which we had had, and it was then too late for us to procure counsel and familiarize them with the facts in the case. He said that it was true that Mr. Blanchard was going to be there; he was a local representative, a Chicago attorney, and that the witness had to come from Springfield, Missouri to Louisville to testify, but that he knew where he could reach Mr. Blanchard, and that he thought that he could get the adjournment. He said he would call me on the next morning and let me know about it. I did not hear from him on the next morning, and accordingly I wrote a friend of mine, an attorney in Louisville, to appear and request that the deposition be adjourned until May 6th. I was in Louisville on May 6th myself. At that time I interviewed the attorney who had gone up to ask for the adjournment. He told me that Mr. Blanchard had appeared and had given as a reason for not wanting to adjourn the testimony the fact [fol. 27] that the witness came from Springfield and he came from Chicago. He had also shown him a telegram which read about as follows "There has been no motion to modify or vacate the notice for the taking of the testimony. You will proceed to take the testimony." That is what we would show if I were sworn and testified. That is what I would swear to.

Mr. White: Your Honor, these statements are absolutely untrue, that is, some of them. He has got just enough truth in it to make it appear as if there was something plausible in it. Taking up the last point first, the telegram that he refers to was sent after I had telegraphed to Chicago to see if the witness could be stopped and if

counsel could be stopped, and got a wire saying "Impossible, Mr. Jonte has left Springfield, Missouri," and it was after all this was over that a telegram was sent saying "No motion made because there had been no stipulation, no agreement to adjourn," and I say right now I positively never consented to postpone the taking of this deposition: that counsel, Mr. Slaughter here, told Mr. Brady of our office over the phone that he would not stipulate any date when that deposition could be taken unless we would exclude the cost of taking it, and I will ask him if that is not true.

Mr. Slaughter: That is not true.

Mr. White: Well now——

The Court: You see, a very sharp conflict.

Mr. White: I have got a deposition.

The Court: Your proper proceeding, it seems to me, under the rule, was to have made a motion at Special Term setting forth all these facts in verified form, and giving notice to the other side that upon these facts you would move for the suppression of the deposi-[fol. 28] tion, and thereupon they would be afforded an opportunity to come into court and meet and rebut, if possible, the statements made by you, and you would have a chance to answer also as to what they claim; but here I am unable to pass upon it. That would be a trial in itself, and the other side claims that these things are not true as you state. They would have to call witnesses to support their claim of the denial, and inasmuch as the depositions apparently are important—are they right to the gravamen of the case?

Mr. Stockton: Yes, sir, they are important.

The Court: And if they were received improperly or excluded improperly, it would mean an important vital disposition affecting the real merits of the case and its substance.

Mr Stockton: Your Honor, it may be that there was a technical objection to the fact that I did not attach an affidavit setting forth all these facts to this particular notice of motion. I do not think that there is a technical objection to making a motion on the trial, but whatever that technical objection was, I think it has been waived by the attorney for the plaintiff when he voluntarily makes a statement and raises a point of issue. If he stood right on his technical objection, all right, but if he does come forward and meet the issue, the technical objection I think is his.

The Court: He does not come forward and meet the issue. He says that what you have stated here is untrue in certain particulars, and I suppose to substantiate that, would necessitate the calling of witnesses as to, for instance, what was done in Louisville and what [fol. 29] was done here and there. That would necessitate the calling of witnesses.

Mr. Stockton: In this particular case, though, he knew. He had Mr. Slaughter's affidavit on our previous motion to have the witness called back for cross interrogatories, which was made just about eight days ago, so that there was no question of his not being advised of the full grounds on which our motion was to be made.

The Court: Let me see your notice in this matter that you have sent.

Mr. Slaughter: I might say, your Honor, in making a motion to compel a witness to attend for cross examination, it was our idea then that we did not want to suppress this testimony. All we wanted was an opportunity to cross examine the witness. (Notice handed to the Court.)

The Court: I think that you, under the rule, were bound to either move upon affidavits setting forth the grounds upon which you moved for the suppression of the deposition at Special Term, or, failing that, that you were bound at least to give notice specifying the reasons and grounds in a verified form under which you would move here for the suppression of the deposition, and in the absence of either the motion or disposition at Special Term, in the absence of the verified statement of the reasons or grounds upon which you intended to move for the suppression of the deposition and thereby giving notice to your adversary, I will deny your motion.

Mr. Stockton: May I, just for the sake of the record, your Honor, call your Honor's attention to the fact that the plaintiff——

The Court: With the additional fact that the plaintiff, as I under- [fol. 30] stand, claims that he had no information, until this statement was made now, as to the actual grounds upon which the application to suppress was made.

Mr. White: No, sir, I will not say that. Your Honor, I am perfectly fair about this matter. The other side made an application at Special Term to have this witness brought back to Louisville, Kentucky from Springfield, Missouri to be cross-examined. The Code provides for ways of taking a deposition upon notice and so forth. Everything has been complied with. The question of unfair conduct has no reference. Even if we had agreed to postpone the deposition, which I absolutely deny, but assuming we had, there is nothing unfair about it. There is a means of doing everything. I know exactly what they are going to come in here and say, because they said it at the other Court. They came in and submitted a deposition in which they made certain statements. Judge Delehanty said to me, "Well, Mr. White, the proposition might be, they might move to suppress." I said, "Your Honor, this deposition has been downstairs before this motion was brought. If they had any grounds to move to suppress this deposition, they would have made it," and the counsel representing Stockton & Stockton said "Why, we don't claim that there is anything unfair about this; there has been some misunderstanding about it." And we went outside, and he said to me "What do you think he will do?" He said, "I tell you what he will do. If you make us bring that witness back, he will make you pay the expenses." And he said, "How about taking them on written interrogatories on cross examination?" I said "That is a different proposition; that would not involve us in any [fol. 31] particular expense." He said "All right; after this motion is decided, I will take that up with you." They have never been near me. They are simply working on a technicality. And another thing, your Honor, in this affidavit at Special Term asking that the witness be brought back for cross examination, the only point they alleged was, they wanted to cross examine him on the four

months' period about filing a claim. That has nothing to do with this case, because the law is governed by the Interstate Commerce Law, and it says that no notice of claim need be filed in this kind of a case.

Mr. Stockton: Your Honor, I think that puts it on record that there was no lack of notice to the attorney in this case. If he had stood on his technical objection, I concede that there might have been an unanswerable argument; but I do not think he has stood on his technical objection. He has gone into the merits of it. I think it was fair of him to go into the merits, but I think we are entitled to whatever action your Honor would have taken on the merits, aside from the technical objection that I did not attach a verified affidavit setting forth the specific instances of unfairness.

The Court: Are these depositions important in the case?

Mr. White: This is the main deposition, your Honor. These eggs were shipped from Louisville. This is the man who shipped them. They have not any defense here that I know of, except they are talking about a four months' claim. The deposition was taken strictly in accordance with the rules. While I do not want to be technical about things, if that is the point they are raising, I say [fol. 32] that this application should have been made at Special Term. The jury has been empaneled. We are ready to go ahead with the case, and this is not the proper place to make the application, unless the deposition only came in today and they did not have time.

The Court: I will deny your motion and give you the benefit of an exception.

Mr. Stockton: Your Honor, just for the sake of the record, might I offer to introduce Mr. Slaughter as a witness to swear to the fact that we stated before you.

The Court: Yes.

Mr. White: Do you mean, your Honor, you will let him go on the stand?

The Court: No; he would have sworn to what he has stated, that is all.

Mr. White: Where does my statement come in? I will swear to what I have stated.

Mr. Stockton: That is all I did, was to offer to introduce him as a witness.

The Court: He would have sworn, if they had called him, to the statement that he has made, and Mr. White would have sworn to what he has stated here if he would have been called as a witness.

Mr. White: Unquestionably.

Mr. Stockton: And of your own personal knowledge, Mr. White.

Mr. White: Everything, except the statement of Mr. Slaughter's, that he would not stipulate this deposition unless we would exclude the cost of it, and I have got a deposition to that effect here, and if the case were on trial, I would have to send and bring the man up here and put him on the stand.

[fol. 33] The Court: I will deny the motion.

Mr. Stockton: We note an exception.

(The jury thereupon returns to the courtroom.)

Mr. White opens the case to the jury on behalf of the plaintiff.

Mr. Stockton opens the case to the jury on behalf of the defendant.

Mr. White: Your Honor, I made a requisition downstairs this morning to have that paper sent up here, the deposition. They say it has been sent up.

Mr. Stockton: Your Honor, I will not make any objection to a carbon copy: I think I probably have a copy of it. I do not care whether he reads from a carbon copy or the original deposition.

Mr. White: That is very kind, your Honor. I have a copy here. Of course the only trouble is there are some exhibits to read. I can start in, however.

The Court: The original paper should be here. That is no excuse for it not being here, if you made a request for it.

Mr. White: I can start in, your Honor, with my copy.

The Court: What is this?

Mr. White: I am going to offer in evidence, the deposition, your Honor.

The Court: You are going to read?

Mr. White: Yes, I am going to read it in evidence: Deposition of George E. Jonte.

Mr. Stockton: Let the clerk copy in that whole preliminary.

Mr. White: I say, we have disposed of this matter. This deposition is on file.

[fol. 34] Mr. Stockton: I am not asking you to read it aloud. I am merely asking you to let him copy it into the record.

Mr. White: Your Honor, the whole thing will be in.

The Court: Read the deposition.

Mr. White: I am going to read the deposition. He is speaking about the preliminary talk which we went into here a few moments ago.

Mr. Stockton: No; I am not speaking about the preliminary talk; I am speaking about the first two pages of the deposition.

Mr. White: That is what I am speaking about, this part of the deposition, the preliminary to the taking of the deposition. The whole thing will be part of this record.

I am now, gentlemen, going to read the deposition of a witness whose testimony was taken on behalf of the plaintiff in Louisville, Kentucky on April 29, 1922.

"George E. Jonte, being duly sworn, testified as follows on examination by Paul E. Blanchard, attorney for plaintiff.

Q. Will you state your full name to the reporter?
A. G. E. Jonte.
Q. How old are you, Mr. Jonte?
A. Fifty-two.
Q. What is your present occupation?
A. Manager for Armour & Co., Springfield, Mo.

Q. Do you mean by that you are manager of the branch house?
A. Manager of the branch house.
Q. Maintained at that place?
A. Yes ,sir.
[fol. 35] Q. How long have you occupied that position, Mr. Jonte?
A. About four weeks.
Q. Prior to that time what position did you hold, and where?
A. Manager of the Kentucky Creameries at Louisville, Kentucky.
Q. Who is the Kentucky Creameries?
A. Armour & Co., a corporation of Kentucky.
Q. Do you mean that that is simply a name under which Armour & Co. does business, or is it a separate Company that is owned by Armour & Co.?
A. It is a trade name only.
Q. How long did you occupy that position, Mr. Jonte?
A. Since November 1, 1917.
Q. What is the principal line of business in which that establishment known as the 'Kentucky Creameries' is engaged?
A. Making butter, feeding and dressing poultry, buying and selling eggs.
Q. How long have they been engaged in that line of business—the present establishment?
A. For a number of years; I can't exactly state the time they commenced.
Q. Can you state whether or not they were engaged in that business during the month of February, 1918?
A. Yes, sir.
Q. They were so engaged?
A. They were.
Q. What experience have you had, Mr. Jonte, aside from that you have described, in the commercial handling of dairy products and particularly, of eggs?
A. I was previously located with Armour & Co. at Springfield, Mo.
Q. For how many years?
A. Five years.
Q. Will you state whether or not the Kentucky Creameries during the month of February, 1918, shipped any of these products?
A. They did.
Q. What kind of products did they ship during that month?
A. Butter, poultry, eggs.
[fol. 36] Q. Who directed and supervised the making of such shipments?
A. I did.
Q. Who made the necessary arrangements with the transportation companies as to the securing of equipment and similar details?
A. I did.
Q. Did you make such arrangements personally or merely supervise them?
A. Personally.
Q. Do you know whether or not the Kentucky Creameries shipped any eggs on February 23, 1918?

A. They did.
Q. What shipment did they make on that day?
A. One in particular of 522 cases to New York City.
Q. Who was the consignee?
A. H. L. Brown & Co., a subsidiary corporation of Armour & Co.
Q. What transportation company handled this shipment?
A. Adams Express Company.
Q. Have you any documents or receipts which evidence that shipment?
A. I have.
Q. Will you produce the same?
A. This is the original Express receipt.
Q. Is this the Express receipt which was issued acknowledging receipt of the shipment you have described?
A. It is.

Mr. Blanchard: I offer this receipt in evidence and ask that the same be marked 'Plaintiff's Exhibit A.'
The Notary so marks said receipt.
Mr. White: That receipt was offered in evidence and is as follows: (Mr. White then reads the receipt to the jury.)

"Q. I notice this 'Plaintiff's Exhibit A.' Mr. Jonte, refers on one side to one car of eggs shipped February 23rd, and on the other side [fol.37] to 15 boxes of poultry shipped April 3rd. Will you state whether or not those shipments were in any way related to each other?
A. None whatever.
Q. How does it come that the receipt of the car of eggs is evidenced on one side of this sheet of paper, which for convenience we will call the 'front' side, and the other side, which for convenience we will call the 'reverse' side refers to a different shipment?
A. The receipt was in a book form.
Q. Are the entries shown on both sides of this receipt the complete original entries?
A. They are.
Q. Was it customary to enter different shipments on both sides of the page in this book?
A. It was.
Q. Who furnished the book?
A. The Express Company.
Q. How does it come that this receipt was taken out of the book?"

Mr. Stockton: I object to that on the ground it is incompetent, irrelevant and immaterial.
The Court. What do you say as to that?
Mr. White: Your Honor, this receipt was taken out of the book, and the next few questions will explain about being in a book and taken out of a book.
The Court: You mean, instead of the book?
Mr. Stockton: No, sir, but the question as to why it was taken out of the book is irrelevant so far as this case is concerned.

The Court: I will allow it.
Mr. Stockton: Exception.

[fol. 38] "Q. How does it come that this receipt was taken out of the book?
A. To support the claim.
Q. What do you mean by that?
A. It was necessary to support the claim with the original documents, including the receipt.
Q. That is, you mean when you filed it with the Express Company?"

Mr. Stockton: Objection as leading and improper.
The Court: I will allow it.
Mr. Stockton: Exception.

"A. Yes, sir.
Q. Why was not the claim supported by filing the whole book?
A. We might want the balance of the book for other information.
Q. Do I understand from that that the book contained more than these two shipments that are shown here?
A. It contains the record of various shipments over various numbers of days.
Q. On the front side of this receipt at the right-hand margin I notice an illegible word beginning apparently with the letter 'M.' If you know what that is will you please describe it?"

Mr. Stockton: I object to that question your Honor on the ground that it appears—I think your Honor can see from following the deposition—that he has no personal knowledge as to what that mark represents.
The Court: He says already, as I remember the reading, that he did this personally.
Mr. Stockton: I had not seen that, your Honor.
[fol. 39] Mr. White: I do not quite get that, your Honor. Did what personally?
The Court: In the beginning he says he made these shipments personally.
Mr. White: He supervised everything.
The Court: He was not asked whether he supervised everything. He said he made the arrangements.

"Q. Who made the necessary arrangements with the transportation companies as to the securing of equipment and similar details?
A. I did.
Q. Did you make such arrangements personally or merely supervise them?
A. Personally."

Mr. Stockton: That is as to securing a shipment, but I do not think that that would mean that he personally received this receipt.
Mr. White: Your Hon[illegible] as we go along it will develop that the eggs were taken down [illegible] the Adams Express Company place, and they were given a receipt for these eggs, and this is the receipt.

Mr. Stockton: He has not testified that he either recognized the handwriting or saw it written in.

Mr. White: I suggest, your Honor, you take it subject to be stricken out.

The Court: Yes; you may make a motion to strike it out later on if it is not connected. I will allow it and overrule your objection and give you an exception.

Mr. Stockton: Exception.

"A. That is the signature of the representative of the Express Com-
[fol. 40] pany who received and receipted for the one car of eggs."

Mr. Stockton: Same objection to that, your Honor.

"Q. Will you state whether or not that was the place on the book that such signatures were usually made, opposite the description?

A. It was.

Q. I note on the front side of this receipt, Mr. Jonte, the date and description appear to have been written in one handwriting, whereas the number of cases and some memorandum in the lower left-hand corner of the same page appear to have been written with a different pencil and by a different hand. Will you explain, if you can, how that came about?"

Mr. Stockton: Your Honor, inasmuch as this is a deposition, and you can see in advance what the answer is, I will make my motion as an objection, because it is a motion to strike out, because the answer is not responsive and prevent it being read.

The Court: I will allow it. Objection overruled.

Mr. Stockton: Allow the answer, your Honor? The question he asks is, that there was a different pencil. He goes on to testify as to whose handwriting it is, entirely irresponsive.

The Court: He is asked, "Will you explain if you can, how that came about?" Is that the question that you are referring to?
[fol. 41] Mr. Stockton: Yes, sir, your Honor, 41.

The Court: I will allow the answer.

Mr. Stockton: Exception.

"A. The skeleton receipt, first prepared by Mr. C. T. Minor, who was our cashier and superintendent, carries all information except the number of cases, the car number and initial, and the value of the goods.

Q. How do you know that a part of this receipt was written by Mr. C. T. Minor?

A. I recognize his handwriting.

Q. Will you read that portion of the writing appearing on the front side of this receipt which is in Mr. Minor's handwriting?

A. 'Louisville, Ky Ky Creameries Feb. 23. 1 Car Eggs cases H. L. Brown & Co., Greenwich St., New York City, N. Y.'

Q. Do you know who wrote the remaining portion of the written part of this receipt?

A. I do.

Q. Who was it?

A. William Underwood.

Q. How do you know?

A. I recognize his handwriting.

Q. Will you read the portion of the receipt which appears in the writing which you recognize as the handwriting of William Underwood?

A. '522 Car No Ad. Ex Co. 6083 $8,143.00.'

Q. Do you know how it came about that these different portions of the receipt were written by different men?

A. The skeleton bill of lading or skeleton receipt prepared by Mr. Minor was for the shipping instructions to guide the party, Mr. Underwood, whom we sent to the car to supervise the loading."

[fol. 42] Mr. Stockton: Your Honor, I renew my motion to strike out the answer to question No. 39. It is in evidence that Mr. Minor was the man who was sent.

Mr. White: I do not see how this witness could testify that that was the handwriting of the Adams Express Company's agent.

The Court: He testifies that he recognizes the handwriting of Mr. Minor.

Mr. Stockton: That is right, your Honor, but I am not objecting to the illegible word beginning apparently with the letter "M," "Will you know what it is, will you please describe it," and that he says in the signature of the representative of the Adams Express Company. That is question No. 39, on page 9 of the deposition.

The Court: 42 is asked: "Q. How do you know that a part of this receipt was written by Mr. C. T. Minor? A. I recognize his handwriting."

Mr. Stockton: That is right, but I mean that shows that Minor was the man that delivered the shipment to the Express Company and took the receipt, and therefore Jonte, the witness whose deposition this is was not the man who delivered the goods to the Express Company and took the express company's receipt.

The Court: He is asked with regard to the handwriting. He says "I recognize his handwriting."

Mr. Stockton: I am renewing my motion to strike out the answer [fol. 43] to Question 39, which was let in subject to connection. Now I think it is clear that it is not connected.

Mr. White: Your Honor, here is the original receipt of the Adams Express Company with the explanation of all the writing on it that he knows on both sides here.

The Court: He swears he recognizes the handwriting of Minor. He also recognizes the handwriting of William Underwood.

Mr. Stockton: That is right. He recognizes all the handwriting of it except that particular initial, which he claims is the initial of the Express Company's agent to show that the Express Company received the goods. Your Honor let that in, because you assumed that he personally had gotten this receipt from the Express Company, and you let it in subject to connection. If you look at the answer to question No. 48, you will see that Mr. Underwood, whom he sent to the car to supervise the loading, was the man that made the last entry on the receipt and obviously got the receipt.

The Court: It does not appear that he may not know or recognize, as he did the handwriting of Minor and Underwood; that he knows that the "M" was the initial of the agent of the Adams Express.

Mr. Stockton: He does not testify that he knows the writing of the Adams Express Company agent.

The Court: I will deny your motion. I will allow it to stay in.

Mr. Stockton: Exception.

[fol. 44] "A. The skeleton bill of lading or skeleton receipt prepared by Mr. Minor was for the shipping instructions to guide the party, Mr. Underwood, whom we sent to the car to supervise the loading.

Q. Why didn't Mr. Minor put in this information which you say appears in the handwriting of Mr. Underwood?"

Mr. Stockton: Objection. He could not know why Mr. Minor did it.

The Court: That calls for a conclusion as to the mental operations of the man doesn't it?

Mr. White: Your Honor, in conducting a large business where one man makes out a receipt and hands it to the other fellow and tells him to take these eggs out to the car and supervise the loading of them and put the number of eggs that are put in that car on it, isn't it proper to explain why one man cannot do everything?

Mr. Stockton: He cannot explain the other man's mental processes.

Mr. White: He is not explaining the other man's mental processes. He is simply telling what the course of the doing of the business is. He gives the receipt to one fellow. He tells him to go down and supervise the loading of the eggs on the car, and when the eggs are on the car, to put it down.

The Court: I think I will allow it. Later on you may move to strike it out.

"Q. Why.

A. He didn't know how many cases of eggs would be sent to the [fol. 45] car or loaded into it or the car number or the initial or the valuation until after the car was loaded.

Q. Now, after Mr. Minor made out what you say is the skeleton portion of this receipt, do you know what was next done with this receipt, and if so, what was it?

A. It was given to Mr. Underwood.

Q. What did he do with it?

A. He took the receipt to the car with him to be completed after the car was loaded."

Mr. Stockton: Your Honor, I again renew my motion to strike out the answer to Question 39. That is more important than appears on the face, your Honor, because it is the question as to whether he has proved the signature of the agent of the Adams Express Company to the receipt.

The Court: There was no question asked him as to that point.

Mr. White: Your Honor, in the Court of Appeals in a case I have got the citation here, explains how the business of the Express Company is done, and it goes on to say that a man frequently goes to a house, gets the package, and then leaves the package with

the expressman. The expressman writes out the receipt. They might have 40 different wagons running around the town. This particular shipment was sent down to the car. The Express Company is the common carrier just like a railroad company. We do not have to be responsible for the railroad companies. An express company under the Interstate Commerce Law is a common carrier. [fol. 46] We sent the eggs down in a wagon to the car which the Adams Express Company furnished. We put them on the car, and one man cannot do it all.

The Court: You see, at 51 he is asked "Now if after Mr. Minor made out what you say is the skeleton portion of this receipt, do you know what was next done with this receipt and if so what was it?" He says "It was given to Mr. Underwood."

"Q. What did he do with it?

A. He took the receipt to the car with him to be completed after the car was loaded."

Mr. Stockton: Yes, sir; I think that cinches my proposition that it was Mr. Underwood who furnished this receipt.

Mr. Underwood is the only man who can testify that the Express Company agent signed for those eggs. I am not trying to strike out this answer to Question 51. I am going back to Question 39 where he has tried to prove that the signature of the agent of the Express Company was on that receipt.

The Court: He says at that time that that M. is the initial of the agent of the company.

Mr. Stockton: And I objected to it on the ground that it appears that he had no personal knowledge of it. I think that question 51 conclusively shows that he could not have any personal knowledge of it, because it was Mr. Underwood and not Mr. Jonte, the deponent, who took the receipt down.

[fol. 47] Mr. White: Your Honor, the eggs were shipped to New York, and we paid the freight bill on them and sold the eggs here.

Mr. Stockton: Are you testifying now?

Mr. White: No.

The Court: You are making the objections to the proof of the receipt of the company.

Mr. Stockton: Yes, sir. I am certainly going to put him to his strict technical proof in this case, because we had no cross examination on this deposition at all, and I am going to put him to the strictest technical proof that he can be put to, and my objection is, that on Question 39 it conclusively appears from these interrogatories, from the answer to question 51, that it was Mr. Underwood who took this express receipt down to the Express Company, and no one but Mr. Underwood or a man who was familiar with the signature of the agent of the Express Company can swear that the agent of the Express Company put his signature on it.

The Court: I will overrule your objection and give you the benefit of an exception.

Mr. Stockton: Exception.

"Q. What did he do with it?

A. He took the receipt to the car with him to be completed after the car was loaded.

Q. Do you know whether or not that was the regular and usual way that such receipts were handled in your organization?

A. It was when we were loading cars down town.

[fol. 48] Q. Would it be handled that way in the case of less than carload shipment?

A. No, sir.

Q. Who ordered this car?

A. I did.

Q. From whom?

A. Adams Express Co., Mr. Latimer, if I remember correctly.

Q. At the time this car was ordered, or at any time prior thereto was any statement or representation made as to the time required for the transportation of a shipment to New York by the Adams Express Co. or any of its representatives?"

Mr. Stockton: Objection, your Honor. He claims there has been an express receipt issued in this case, and that would certainly determine the provisions of the contract. My objection is, that it tends to vary the wording of the express receipt which he claims to have been issued, which was the contract between the parties.

Mr. White: Your Honor, this has reference to an entirely different matter; in other words, the representation as to how long it would take these eggs to come from Louisville to New York.

The Court: Does the receipt say how long it would take to go to New York?

Mr. Stockton: No, sir.

Mr. White: How can it vary, this, then?

Mr. Stockton: I think the receipt says that we shall not be liable —no, that receipt does not say anything. Let us see that receipt (After examining.) It says "Subject to classifications."

The Court: I will overrule your objection and give you an exception.

Mr. Stockton: Exception.

[fol. 49] "A. I cannot say that there was on this particular car but we had been shipping special cars by the Adams Express Co. to New York"——

Mr. Stockton: I move to strike out the rest of the answer. He is obviously talking about other cars. He says he cannot say that there was any such representation.

The Court: How is that part of the answer relevant, as to what occurred with regard to other cars?

Mr. White: Your Honor, the Adams Express Company, like all common carriers, is out looking for business. When they come in, they say, how long will it take to ship the carload of eggs. They say such and such a thing. He is simply saying what the customary ordinary business of the Adams Express Company is as to the time they stated it would take for these eggs to come.

Mr. Stockton: I also add a ground to my objection on the fact that it is not responsive. The question is, did the company make any representation with respect to this particular car. The witness says no; then he goes on and adds a lot of other stuff that I claim is absolutely unresponsive.

Mr. White: "Mr. Latimer had explained to me on different occasions that their service from Louisville to New York City was 4 A. M. second morning delivery." If you want the first part of that out, I do not care.

[fol. 50] Mr. Stockton: Why do you suppose I made the motion to strike out if I expected you to read it, unless it was that I wanted you not to read it?

Mr. White: I am sure I do not know. You have objected to everything I have read so far.

Mr. Stockton: If you go and read it yourself without letting the Judge rule on the question——

The Court: The answer is "I cannot say that there was on this particular car." What occurred on other cars or at other times I do not think is responsive. I will grant your motion to strike it out.

Mr. White: What goes out, then, your Honor?

The Court: The answer is complete. He says "I can't say that there was on this particular car." The next question is "Who is Mr. Latimer."

"Q. Who was Mr. Latimer?

A. He was General Agent of the Adams Express Co., Louisville, Kentucky.

Q. Do you know what kind or grade of eggs was loaded in this car, and if so, what was it?

A. Rehandled current receipts.

Q. Was that a high or a low grade of eggs?

A. They graded on the New York market as firsts.

Q. Is that the highest grade or lowest grade or what?

A. The highest grade is extra firsts.

Q. And then what is next?

A. The next grade is firsts.

Q. Was there any inspection made of these eggs before they were loaded?

A. There was.

Q. How long before?

A. The same day of shipment.

[fol. 51] Q. By whom was such inspection made?

A. Myself.

Q. Do you know from that inspection what the condition of those eggs was at the time they were loaded?

A. I do.

"Q. What was that condition?

A. Good.

Q. What date were these eggs loaded in the car?

A. February 23, 1918.

Q. When did this car leave Louisville, if you know?
A. February 23rd.
Q. How do you know it did?"

Mr. Stockton: I object to this question and move to strike out the answer to the previous question.
The Court: Objection overruled and motion denied.
Mr. Stockton: Exception.

"Q. How do you know it did?
A. By information furnished by the Express Company.
Q. Where?
A. By telephone.
Q. Was this information——"

Mr. Stockton: I renew my motion to strike out that answer as to when did this car leave Louisville, because it is again brought out in the answer that the information was by telephone. I think that clearly shows it is only hearsay. It does not show that he knew with whom he was talking.
Mr. White: Your Honor, if you talk to me over the 'phone, I will certainly know whom I am talking with. The next answer explains that he got further information.
[fol. 52] The Court: I will overrule objection and give you the benefit of an exception.
Mr. Stockton: Exception.

"Q. Was this information furnished to you or someone else?
A. Furnished to me.
Q. By whom—what individual?
A. I couldn't give the exact name—we would always call the Express Company and ascertain whether cars had gone forward, or not.
Q. Upon what terms was this shipment made to the consignee shown in the receipt, if you know?
A. You mean as to price or valuation?
Q. Was it F. O. B. Louisville, F. O. B. New York, consignment or what?
A. Consigned.
Q. And what do you mean by that?
A. To be sold on arrival based on the market.
Q. For whose account?
A. Kentucky Creameries, Louisville.
Q. Did the consignee of this shipment ever make any return to you showing the results of such sale?
A. They did.
Q. Have you that return?
A. I have.
Q. Will you please produce it?"

Mr. Stockton: I object, your Honor, to the production. I object to the request.
The Court: For the production of the sales return?
Mr. Stockton: Yes, for the production of the sales return.

The Court: Objection overruled.
Mr. Stockton: Exception.

"Q. Will you describe briefly what this piece of paper is and what is shown thereupon?
[fol. 53] A. Account sales of the returns that was issued by Harold L. Brown Company.
Q. Was any document enclosed with that return, or did it come separately?
A. A check.
Q. For how much?"

Mr. Stockton: Objection. The amount of that check I think is entirely irrelevant. The amount of their return realized on a sale of these eggs in New York has no bearing on the measure of damages in this case at all.
The Court: That remains to be seen, doesn't it?
Mr. White: If it is so unimportant, your Honor, why waste time about it? I am trying to expedite the matter, and my friend is raising all kinds of technical objections.
The Court: The measure of your damages is the difference what the market value would be on the day that this, according to your contention, should have arrived, and the day that it actually arrived.
Mr. Stockton: That is a question of proof of market value, not a question of the proof of the amount of the return that they received from their consignee.
Mr. White: Your Honor, I will consent that it go out.
The Court: Then 83 goes out.

"Q. What other returns, if any, did you ever receive from this car?
A. None.

Mr. Blanchard: I offer in evidence the document referred to by [fol. 54] the witness and ask that the same be marked 'Plaintiff's Exhibit B.'
The notary so marks said paper."
Mr. Stockton: At this time I object to the offer of that in evidence. What he states is equivalent to an offer in evidence at this trial. I object to the receipt of that return in evidence.
The Court: Do you mean the check?
Mr. White: No, no; he does not mean the check. I will let the check out.
Mr. Stockton: That is the sales account on his consignee.
The Court: What is the ground of the objection to that?
Mr. Stockton: The ground of the objection is, that it is the market price that determines the damages, and that the sales account from his consignee might be influenced by a number of factors which would not bear any relation to the market price.
The Court: If the sales account is not shown to be the market value, what then?
Mr. Stockton: I think the burden is on him to show that it is the market value, not on me to disprove it.

Mr. White: Your Honor, this receipt, if you look on it, gave what the eggs were sold for. I will prove that that was the market value of eggs on that day.

Mr. Stockton: Then why do you want the receipt in?

The Court: You may move to strike it out if he fails to do that.

[fol. 55] Mr. White: There has been one part of this objected to, and that was the amount.

The Court: I overrule the objection.

Mr. White: This is the return made by Harold L. Brown of 325 Greenwich Street to the Kentucky Creameries for these eggs that we sent on here to be sold. This is the return made to the people, the consignor by the consignee, and it simply says, "We enclose herewith our check for — Dollars covering shipment received March 4th, 1918."

"Q. Did you afterwards learn upon what date this shipment arrived in New York?

A. I did."

Mr. Stockton: You are a little swift, I object on the ground that it is incompetent, irrelevant and immaterial. It is heresay also.

The Court: If it is not connected, you may move to strike it out. I overruled the objection.

Mr. Stockton: Exception.

"Q. When did you first receive that information?

A. From Mr. R. M. Brooks about March 17th, enclosing a wire from Mr. C. P. Rickrich."

Mr. Stockton: I renew my motion to strike out the answer to Question 85. It is obvious it is hearsay.

The Court: I will deny your motion at this time subject to a motion to strike out if it is not connected.

Mr. Stockton: Exception.

[fol. 56] "Q. Had your prior to this time made any effort to trace this car?

A. I had.

Q. How did you go about it?

A. Addressed a letter to the Adams Express Company.

Q. Where?

A. Louisville, Kentucky.

Q. What date?

A. March 11th.

Q. Did you make any other attempt to follow this prior to the receipt of the Brooks letter on or about March 17th, that you testify to?

A. Not that I remember of.

Q. After receiving Mr. Brooks' letter did you make any such attempt?

A. I did.

Q. Will you detail briefly your efforts?"

Mr. Stockton: Objection to the answer on the ground that the only evidence that would be of any importance would be evidence of the filing of a written claim in accordance with the provisions of the express tariffs and classifications. The question is so broad that it calls for an answer which would be something beside written classifications. If your Honor will look at the answer, you will see he refers to telephone conversations.

Mr. White: Your Honor, the question of four months notice, the filing of a written claim, is not necessary under the Interstate Commerce Law.

The Court: That is another question.

Mr. White: I suppose that was what my friend was mentioning here.

Mr. Stockton: I object to question 93 on the ground that it might be proper to ask him for any letters he wrote, but efforts *be* made is too broad, and the answer itself shows that.

[fol. 57] The Court: I will overrule your objection.

Mr. Stockton: Exception.

"A. We no doubt used the telephone to a considerable extent"——

Mr. White: Your Honor, I am perfectly willing that that should go out, that part of the answer "but we also addressed letters to the Adams Express Company under date of April 1st and May 7th."

The Court: One moment, now. "92—After receiving Mr. Brooks' letter did you make any such attempt?

A. I did. 93—Will you detail briefly your efforts" you consent to strike out?

Mr. White: We undoubtedly used the telephone to a considerable extent, but just leave it read "We addressed letters." Leave out the word "also." "We addressed letters to the Adams Express Company under date of April 1st and May 7th."

"Did you receive any acknowledgment of your letter of March 11th, from the Adams Express Company?"

Mr. Stockton: Objection. He will have to authenticate the letter. The letter must be authenticated in a more definite way than that. He cannot merely say, did you receive a letter.

The Court: "Did you receive any acknowledgment of your letter of March 11th from the Adams Express Company."

Mr. Stockton: Yes. I do not think he can just say "I received [fol. 58] an acknowledgment," unless he can show that the letter was written.

The Court: Objection overruled.

Mr. Stockton: Exception.

"A. I did.
Q. Have you that letter?
A. I have.
Q. Will you produce it?

A. (Witness does so).
Q. By whom was this letter signed?"

Mr. Stockton: Objection. This shows that the letter cannot be authenticated, I think.
Mr. White: If the letter is here.
The Court: This witness says "By C. W. Latimer."
Mr. Stockton: That is what he says. How does he know it?
The Court: That I think the deposition shows.
Mr. Stockton: It does not show that he knew Mr. Latimer's handwriting.
The Court: I will overrule your objection.
Mr. Stockton: Exception.

"Q. By whom was this letter signed?
A. Mr. C. W. Latimer.
Q. Is that the same Mr. Latimer you have heretofore referred to?
A. It is.

"This letter was offered in evidence and marked Plaintiff's Exhibit C."

Mr. Stockton: I object to the letter. You are offering it in evidence now, aren't you?
[fol. 59] Mr. White: The whole deposition, yes, the letters.
Mr. Stockton: I object to the introduction of the letter in evidence on the ground that it is not properly authenticated, also on the ground that it does not constitute a claim within the requirements of the express receipt.
The Court: Objection overruled.
Mr. Stockton: Exception.
Mr. White: I will read this exhibit, gentlemen.
(Mr. White then reads.)

"Q. Did you receive any answer to any of your other letters of inquiry from the Adams Express Company or any of its agents or officers?
A. I did.
Q. In what form"——

Mr. Stockton: You were a little too quick. I should have objected more quickly. It was not his fault that time, but I do object to the answer to that question, your Honor.
The Court: Objection overruled.
Mr. Stockton: Exception. Is it overruled on the ground that I did not state my reasons. I object on the ground that the letters are not properly authenticated. There is no proof of an answer or acknowledgment having been made by the Adams Express Company.
The Court: Overruled.
Mr. Stockton: Exception.

"Q. In what form?
A. Letter.
[fol. 60] Q. What date?

A. May 16, 1918.
Q. By whom was such letter signed?"

Mr. Stockton: Objection on the ground that there is no evidence to show that he knew who the person signing the letter was.
The Court: His objection goes to the point that it is not shown affirmatively that the person signing this letter was what he purports to be in the company.
Mr. Stockton: Or that any such man signed the letter.
Mr. White: Your Honor, here is a letter on the paper of the Adams Express Company acknowledging receipt and signed C. W. Latimer. Prima facie that letter is certainly written by the Adams Express Company. Whether Latimer signed it or if he authorized somebody in the office to sign it. I had been out of the office yesterday; I authorized somebody to sign my name, but if it comes from me in the regular course of business, it seems to me that that is perfectly proper evidence.
Mr. Stockton: I never heard the rule so broad as to the mere introduction of a letter written on a letterhead constituting an admission by that company that it was its letter.
The Court: I overrule your objection.
Mr. Stockton: Exception.

"Q. By whom was such letter signed?
A. F. L. Grinstead, General Agent.
Q. Have you that letter?
A. I have.
[fol. 61] Q. Will you produce it?

A. (Witness does so.)

"It is marked Plaintiff's Exhibit D."
The Court: It is offered in evidence, and you object to its being received in evidence.
Mr. Stockton: Yes, sir, not properly authenticated.
The Court: Objection overruled.
Mr. Stockton: Exception.
Mr. White (Reads):

These letters, your Honor, as I understand it, I am offering this deposition and all the exhibits attached to it in evidence.
The Court: No; I understand you read the deposition in evidence, and the objection is made as you read just the same as if the witness was here.

"Q. Mr. Jonte, did the information which you receive relative to the arrival date of the car show whether the car had been subject to delay in transit, or not?"

Mr. Stockton: Objection, hearsay, incompetent.
Mr. White: Your Honor, how in the world can that be hearsay if a man finds out that a car arrived several days after the time it should arrived?

The Court: You mean to say that the next question is an amplification of the letter itself that you have just read.

Mr. White: Not at all, your Honor. "Did the information which you received relative to the arrival date of the car"—that had noth- [fol. 62] ing to do with the date of arrival. He is simply asking him now, "Did the information you received as to the arrival of this car in New York indicate to you that it had been delayed in transit?"

Mr. Stockton: It shows it is received. He received information.

The Court: He does not state the source of his information or where he got it or what the information was.

Mr. White: Do I understand your Honor strikes that out? He is simply asking about the information received.

The Court: How is the defendant to be bound by information that he received? It does not appear who gave him the information, where he got it from.

Mr. White: Your Honor, it is already in evidence here, the returns by Brown & Company for these eggs stated that this car was received on March 4th. He is simply asking him——

The Court: That is what I have asked you: Is this taken from the information already had?

Mr. White: Some prior papers, yes.

The Court: Are those papers in evidence here?

Mr. White: Yes, your Honor.

Mr. Stockton: What papers are they?

Mr. White: There is one of them (showing paper to Mr. Stockton).

The Court: What is that exhibit there that you are referring to?

Mr. White: This, your Honor, is the return on the eggs. It states [fol. 63] on its face "We enclose herewith check" so much, covering so much.

Mr. Stockton: Your Honor, do I understand that he is going to prove that the shipment arrived in New York on March 14, 1918 by a copy of a sales return from his correspondents in New York?

Mr. White: Your Honor, that is not the way I am going to prove it. I will prove it by other testimony.

Mr. Stockton: That is the basis upon which he is attempting to get in the answer of this witness.

Mr. White: That is not what I am relying upon entirely to prove that the eggs arrived here on March 4th.

Mr. Stockton: That witness then is testifying entirely from hearsay.

The Court: I will take it subject to a motion to strike out, that is, that part commencing with "105."

Mr. Stockton: This is very serious, I mean, it is going to prejudice a great deal, if the evidence gets in in that way before the jury, even if it is subsequently stricken out, your Honor, I think. If you read Questions 106 and 107, you will realize I think, that it is preferable to pass on it now and either strike it out or let it in.

The Court: I will allow it in subject to a motion to strike it out.

Mr. Stockton: Exception.

"Q. How much of a delay?
"A. About one hundred and eighty-six hours."

Mr. Stockton: Same objection and exception to this.

[fol. 64] "Q. Do you mean that was the time in transit or that was the delay in transit?"

Mr. Stockton: Same objection and exception.

"A. The time in transit was from February 2'd until March 4th, two hundred and sixteen hours.
Q. Upon learning that this shipment had met with delay did you make any investigation as to the cost of this specific shipment, or not?
A. I did."

Mr. Stockton: Objection, irrelevant and immaterial.
The Court: Objection overruled.
Mr. Stockton: Exception.

"Q. Do you know at the present time what that particular shipment of eggs cost you, F. O. B. Louisville?
A. I do.
Q. How much did that shipment cost you?

Mr. Stockton: Objection, your Honor, on the ground that it is irrelevant and immaterial.
The Court: Objection overruled.
Mr. Stockton: Exception.

"A. 47 cents per dozen.
Q. How many dozen eggs were contained in the entire car?
A. 15,660.
Q. Did you receive any credit to be applied against this cost other than the return of the Harold L. Brown Company as shown by Plaintiff's Exhibit B?
A. We did not.
[fol. 65] Q. Referring to Plaintiff's Exhibit A, what is that meaning of the numbers which you testified were written thereon by Mr. Underwood?
A. '522' represents the number of cases of eggs; 'y083,' the number of the car; '$8,143.00' the valuation of the 522 cases of eggs.
Q. Are those figures correct, according to your records?
A. Yes, sir.
Q. On the reverse side of Exhibit A there appears a rubber stamp reading 'Subject to delay account congestion.' To what shipment did that notation refer?"

Mr. Stockton: Objection. I do not think the witness has shown he is qualified to state as to what this notation refers.
The Court: The previous testimony, as I recall it, of the witness is, his attention being called to the fact that there are two shipments, the eggs on one side and the poultry on the other, he says that it is

kept in a book. That is the reason that the shipment of April 4th or 5th of the poultry has no reference whatever to the eggs. This is on the reverse side of Exhibit A, that is, on this side of the shipment of poultry there appeals a rubber stamp "Subject to delay account congestion, to what shipment did that notation refer," and then he proceeds to answer that it appears from previous testimony that that is the only shipment on that side of the receipt.

Mr. Stockton: My objection was to the fact that it appears that [fol. 66] he did not have any personal acquaintnace with the delivery and acceptance of the receipt; that it was Mr. Underwood that did it.

The Court: I will overrule your objection.

Mr. Stockton: Exception.

"Q. On the reverse side of Exhibit A there appears a rubber stamp reading 'Subject to delay account congestion.' To what shipment did that notation refer?

A. 15 boxes of poultry consigned to Armour & Company, Atlanta, Georgia, April 3, 1918.

Q. Was any similar reservation made either in writing or orally by the Adams Express Company in connection with the shipment appearing on the front side of this Plaintiff's Exhibit A?"

Mr. Stockton: Objection on the ground that it appears from the deposition itself that he was not the one who was actually present when the shipment was delivered. It was Mr. Underwood, and Mr. Jonte is not able to testify as to any oral representation that may have been made by the Express Company at that time.

The Court: Objection overruled.

Mr. Stockton: Exception.

"A. No, sir."

(End of reading.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. White: Do you want to make some motion?

Mr. Stockton: No; I was going to read the rest of this deposition.

[fol. 67] Mr. White: I have read all of the deposition.

Mr. Stockton: Your Honor, I think it is my privilege to read the first two pages of this deposition to the jury, is it not?

Mr. White: Your Honor, we have discussed this matter here.

Mr. Stockton: They are certainly an integral part of the deposition.

Mr. White: I do not see how that has anything to do with it.

The Court: No; that all refers to conversations or discussions with regard to proceeding to take the deposition.

Mr. Stockton: That is true, sir, but it is returned under the seal of the notary who took the deposition, as an account of what took place. Here he has a direct examination. It does not appear, so far as the jury is concerned, that there is no cross examination.

Mr. White: Your Honor, if we are going into that, I would like to submit the question to the jury. My friend here is going to attempt to insinuate to this jury that they did not cross examine this wit- because of our fault.

Mr. Stockton: I am not going to insinuate.

Mr. White: I do not know what you are going to do, then.

Mr. Stockton: Nothing except what appears in the deposition which you took yourself should be read by yourself.

Mr. White: The deposition is after the witness is sworn. It cer-
[fol. 68] tainly cannot be something that is preliminary to taking the deposition.

Mr. Stockton: I certainly think I am entitled to explain why there was no cross examination, especially if it appears under the certificate of the notary who took the deposition.

The Court: Do you mean that you desire to read the certificate of the notary public?

Mr. Stockton: No, sir; the first two pages which appear under the certificate of the notary as to what happened at this deposition.

The Court: Does that embrace the matters that were discussed on the motion to suppress the deposition?

Mr. Stockton: Only to the extent that it appears in the deposition itself. I am not attempting to enter into any argument as to the question that was argued while the jury were out. All I want to do is to read to the jury what was actually stated at the hearing.

Mr. White: Your Honor, that is exactly the same thing. He brought this question up, and you have decided against him. If he is going to read this deposition, it is necessary for me to go in and explain entirely to this jury what they tried to do, and why they did not have the counsel there to cross examine him.

Mr. Stockton: Your own counsel presumably explained it at the taking of the deposition.

Mr. White: He was not here.

[fol. 69] The Court: What is the purpose of that except to get these facts or statements before the jury. The Court is already apprised of them and has passed upon them.

Mr. Stockton: I want to get before the jury the fact that the counsel who appeared for us at the depositions had no authority to take the depositions, and that he appeared and asked for an extension, stating the reasons why he wanted an extension; that the other counsel opposed it, and that the depositions went ahead, and that we were not able to cross examine for that reason.

Mr. White: Your Honor, there is a whole lot of preliminary matters leading up to this, their insistence that we must not charge up the cost of this deposition before they would agree that we should take it, their neglect to ask for any adjournment, their refusal to adjourn it unless we would not tax up the costs.

Mr. Stockton: He is going into it, all right.

Mr. White: Yes, I am going into it.

The Court: I think that that matter would be only confusing to the jury. The question as to the disposition of the deposition on the grounds that are referred to in the certificate here of the notary pub-

lic or the statements made in the deposition, have already been passed upon by the Court on your motion to suppress the deposition, and therefore I will deny your motion to read any other part of the deposition than the testimony or evidence.

[fol. 70] Mr. Stockton: May I make, purely as a matter of record, an offer to read the first two pages of the deposition?

The Court: Yes.

Mr. Stockton: Let us say, the first two—the first three pages of the deposition.

The Court: Yes, and then the last page?

Mr. Stockton: And permission is refused and exception taken.

Mr. White: Your Honor, in view of these statements of counsel here before the jury, I think that in the question of summing up this case, I have got a right to go into this.

Mr. Stockton: I have not made a statement, except that I want to——

Mr. White: It merely throws out an insinuation here.

The Court: That is something with which the jury has nothing to do. That has been passed upon as a matter of law by the Court.

MICHAEL P. HUGHES, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. White:

Q. Mr. Hughes, what is your business?

A. At the present, egg inspector.

Q. For whom?

A. Armour & Company.

Q. And how long have you been employed by Armour & Company?

A. About one year.

[fol. 71] Q. And prior to that time by whom were you employed?

A. Harold L. Brown Company.

Q. And what was your particular line of occupation with Brown & Company?

A. Assistant shipping clerk.

Q. Who was shipping clerk?

A. Andrew C. Jones.

Q. I show you a paper and ask you if there is any writing on that by you (handing paper to witness)?

A. Yes, sir.

Q. Will you kindly indicate what?

A. "March 4, 1918, Ad. 6083, Gillen."

Q. What does that mean "Ad. 6083," what does that mean?

A. Car number.

Q. The "A." stands for what?

A. Initial.

Q. Whose initial?
A. Initial of a car; initial of the car.
Q. Adams Express car or what?
A. "Ad." Adams Express car 6083.

Mr. Stockton: Your Honor, I do not mind him leading him gently, but I hate to see him push him along that way. I move to have that answer stricken out.
The Court: He asked him to state if he knows what that initial stands for.
Mr. Stockton: And he put the answer in his mouth, it seems to me.
The Court: Do you want to strike out the question and the answer?
Mr. Stockton: Yes, sir.
The Court: Strike out the question and the answer and ask him again.
Mr. White: Just what question is stricken out?
The Court: You asked him if it was Adams Express Company. Let him say.

[fol. 72] Q. What does the "Ad." stand for on this paper?
A. Well, the "Ad." as far I know is car initial; car initial and number.
Q. What do you mean by car initial?
A. Well, it is the initial of the car, as far as I know. I don't know.
Q. Will you kindly tell the jury, did you make out this slip?
A. I did, yes.
Q. You put those numbers on it?
A. Yes; I made out the slip.
Q. And how did you come to put them on this slip?
A. Why, that is the car—that is the information I got from the Express Company, that the goods arrived on such car number, a car and initial.

Mr. Stockton: I move to strike the answer out your Honor as hearsay.
The Court: I will allow it to stand.
He says that is the information he got from the Express Company.

Q. You mean when the Adams Express Company notified Brown & Company, you, as the assistant shipping clerk, would get information that there was a carload of eggs, and you put it on this paper; is that it?
A. Yes, sir, that is it; just it.
Q. And did this have a number to it?
A. The sheet?
Q. Yes.
A. Yes, sir, it has.
Q. Are these sheets numbered consecutively, serial numbers, or what?
A. Yes, sir.

Q. In other words, did you put the number on there, or was it taken out of a book?

A. It was taken off a pad.

Q. Off a pad?

A. Yes, sir.

[fol. 73] Q. And these numbers are what, one after the other?

A. One after the other, yes, sir.

Q. When you put this information on this report of the date and car number and so forth, what was then done? Did you go after the eggs or what?

A. No; I gave an order to our truckman to go up for the eggs and bring them down to our store.

Q. You stated that on this paper was "March 4, 1918 Ad. 6083." Is there anything else on there that you have got right after the "6083"?

A. Carted by Gillen."

Q. Is that in your handwriting?

A. "Gillen" is.

Q. The word "Gillen"?

A. Yes, sir.

Q. Who is Mr. Gillen?

A. He was our truckman at the time.

Q. And that meant, that you had notice from the Express Company which you had put down here and that Gillen was the man who was to cart the eggs?

A. Yes, sir.

Mr. Stockton: Objection as leading. Just let him ask him what it means.

The Court: Ask him what it means.

Q. Ignoring all the rest of this writing but just what you have testified to, what did that mean?

A. Why, that means that the car of eggs arrived; that the Adams Express Company—that I was to bring that car of eggs into the store, and I gave Gillen a notice; that is, an order, one of my orders to go up on the dock or yards or wherever the car was, and bring the car into our store.

[fol. 74] Mr. Stockton: I move to strike this answer out. It is obvious that his information on that is all hearsay. If I can cross examine him, I can show that he does not know, that he never went to the Adams Express Company depot in this case.

By Mr. Stockton:

Q. Did you? Did you go to the Adams Express Company depot in this case?

A. No, I did not.

Q. Did you take the number from the car yourself?

A. From Gillen and the Express Company.

Mr. Stockton: I move to strike that out.

The Court: He says "and the Express Company."

Q. Who is the Express Company?
A. Why, when a car arrives, they would call up H. L. Brown & Company.
Q. Who calls up?
A. The Express Company.
Q. On the telephone?
A. On the telephone.
Q. How do you know it is the Express Company?
A. Well, they say "This is Adams Express Company calling. We have here"——
Q. Do you recognize the voice?
A. No, I do not.

Mr. Stockton: I renew my motion to strike out.
Mr. White: Your Honor, we would never be able to do any business in the world, the way my friend is going on here.

[fol. 75] By the Court:

Q. Was that the usual way and the course of business when a car arrived?
A. Yes, your Honor.
Q. What was the usual course?
A. The usual course was that when a car arrived at such a yard, the agent or receiving clerk——
Q. Talk to the jury.
A. The agent or receiving clerk would call up the party concerned, whoever the car was consigned to, and notify them that they had a car so and so at their yards consigned to them, and in turn, I would write out an order and give it to our truckman, and he would go up and take delivery of the car of eggs on our order.

Mr. Stockton: What ruling is there on my motion, your Honor.
The Court: Objection overruled.
Mr. Stockton: Exception.

By Mr. White:

Q. Then what was the course of business about the eggs? You say you gave somebody an order for them. What happened then?
A. Gillen would bring the eggs down. When the first load would arrive at the door, I would make out a sheet, give the eggs a lot number.
Q. And then would the eggs be checked out of the wagons as they came in?
A. Yes, sir.
Q. And a memorandum kept of the number of cases?
A. Number of cases.
Q. To see if it conformed with this or what?
A. Yes; there was a book made out with the number of cases, and [fol. 76] then the whole car when it come in, it was put down. In fact, the first load, that sheet was made out giving the eggs a lot number, and all eggs was carried under that lot number in that car.

Cross-examination.

By Mr. Stockton:

Q. Did you personally go to the Express office?
A. No. I did not.

By the Court:

Q. You were the shipping clerk in this place?
A. Assistant shipping clerk, your Honor.
Q. And in the course of your duties, was it your duty to attend to these receipts of eggs?
A. Yes, your Honor.

By Mr. Stockton:

Q. Was all the information that you have just read out from that paper obtained by you from someone else?
A. No; I took charge of all. All that I put on that paper was carried out through me.
Q. Yes; but where did you get the information as to the number, some number "Ad.," with the initals "Ad."?
A. Adams Express Company.
Q. You got that over the telephone?
A. Yes, sir.
Q. Did you recognize the voice?
A. No, sir.
Q. You did not recognize the voice at all?
A. No, sir.
Q. Did they call you directly or call someone else?
A. When calling, they would always ask for the receiving clerk.
Q. Was it always put on your wire?
A. Yes, sir.
[fol. 77] Q. But the information as to the number of cases of eggs, did you count those eggs?
A. Yes, sir.
Q. You counted all the eggs?
A. Yes, sir.
Q. All the dozens?
A. No, just cases.
Q. Just cases?
A. Just cases.

Redirect examination.

By Mr. White:

Q. Mr. Hughes, you simply counted the cases. Would know whether the case was a full case of eggs or not?
A. I would, by picking it up, if I handled the case.
Q. And was that done in this case, or was that done in all cases?
A. We simply just handled the cases.

Recross-examination.

By Mr. Stockton:

Q. Can you swear you picked up every one of these cases and handled them?
A. I do not.
Q. Can you swear that every one of these cases was actually full and had the full number of dozens in them?
A. No, I cannot.

JAMES L. FERRIS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. White:

Q. What is your business, Mr. Ferris?
A. Bookkeeper.
Q. For whom?
A. Armour & Company.
Q. How long have you been employed by Armour & Company?
A. Twenty-one years.
[fol. 78] Q. Were you ever employed by Harold L. Brown or, simply, as a subsidiary company of Armour?
A. I was assigned to duty there by Armour & Company.
Q. Are there any of your initals or marks or writing on that paper (handing paper to witness)?
A. Yes, sir. I noted the payment of the receipt, the "F." there.
Q. What is this paper?
A. That is a stock sheet, both receipts and sale.
Q. Did you get this from the original records of Harold L. Brown?
A. Yes, sir.
Q. Does that sheet show when the eggs on lot report No. 1632 were sold?
A. Yes, sir.

Mr. Stockton: I object to that question your Honor.
The Court: He is the man that has charge of it.
Mr. Stockton: As I understand, he is only a bookkeeper making copies from their records; is that right?
The Witness: That is not a copy, no, sir; that is the original.
Mr. Stockton: But did you make that up from other records?
The Witness: No, sir. The original, that is the original receiving record. The sales are transcribed from our daily sales slip.
The Court: You know that to be a fact, do you?
The Witness: Sir?
The Court: You know that to be a fact, that that is the original receiving record?

The Witness: Yes, sir.
[fol. 79] The Court: I will allow it. Objection overruled.
Mr. Stockton: Exception.

Q. These original sales receipts here were transcribed to this record from some other paper?
A. Yes, sir.
Q. I hand you another book of sheets, and ask you what that is (handing book to witness)?
A. That is the individual sales tickets.
Q. Sales tickets?
A. Sales tickets, yes, sir.
Q. Will you tell the jury what you do when they make a sale?

Mr. Stockton: I object. I do not think it is shown that he made the sales himself.
The Court: How is this relevant?
Mr. White: Your Honor, here are the original records on this particular transaction. This book here with these sheets——
The Court: You have not shown that. You have not asked this man whether these tickets that you now hand him show anything with regard to those papers that you have in your hand.
Mr. White: I beg your pardon. I though- I did.

Q. The statements here of the different number of eggs sold are shown in that book, are they?
A. Yes, sir.
Q. And the book number on this sheet is the number in that sheet?
A. Yes, sir, the sales ticket number.
Q. The sales ticket number is there?
A. Yes, sir.
[fol. 80] Q. Showing the number of eggs sold, does it?
A. Yes, sir.
Q. And to whom it was sold?
A. Yes, sir.
Q. And the day it was sold?
A. Yes, sir.
Q. And it is all transcribed on this one sheet?
A. Yes, sir.

Mr. Stockton: May I just ask him as to those sheets that he has in his hand, your Honor?
The Court: Yes.
Mr. Stockton: Just preliminary. It will probably save a little time.

By Mr. Stockton:

Q. Do you do any writing on those sheets yourself?
A. Why, I may extend the amount, not the sales.
Q. You extend the amount from figures already on there?
A. Yes, sir.

Q. Do you make any sales yourself?
A. No.

Mr. Stockton: That is all. I think it shows that he is not competent to let those be used in evidence or to be testifying from.

By the Court:

Q. The papers that you have in your hands, do you recognize them?
A. Yes, sir.
Q. What are they?
A. Sales tickets.
Q. For whom?
A. For Harold L. Brown & Company.
Q. For what year?
A. 1918.
Q. Do they show anything with regard to the sales of the eggs [fol. 81] referred to in the paper that has already been shown you?
A. Yes, sir.
Q. What do they show?
A. They show so many cases, different number of cases.
Q. I mean, do they show the sales on that particular lot?
A. Yes, sir.
Q. In what way?
A. Why, the lot number——
Q. Day by day?
A. Yes, sir.
Q. Or by particular consignment or sales to different people?
A. The lot number is shown on it.
Q. So that these papers show the sale of each lot of the shipment referred to in the paper which you have already been shown?
A. Yes, sir.

Mr. Stockton: Your Honor, I want to call your attention to the fact that he personally does not know anything about that. That is only hearsay that he gets that from.

Q. That was the record kept in your business, was it?
A. Yes, sir.

Mr. Stockton: But he only made one entry on it, and if the rule is that records to be authenticated must be authenticated by the man who made the entry and knew that to be true, you have got to, under that case in Ellis v. The City of New York, I think it was, which laid down the hard and fast rule on the admission of business entries in this State. I do not understand that unless he has some personal knowledge of the transaction, or copies it from a document which is authenticated itself in that manner, that that document can be used [fol. 82] either to refresh his recollection or to be introduced in evidence.

The Court: What do you say as to that?

Mr. White: Your Honor, here are the original egg report receipts. There are the original egg sales slips, showing how many dozen were sold, whom they were sold to, the dates they were sold, the price they were sold at, and they are simply transmitted and kept on one sheet. These were kept in his office.

Mr. Stockton: That does not authenticate them, under the rule in New York.

The Court: Did he keep this book?

Mr. White: He checked that up, your Honor. He testified this was his initial, that he checked those sales on to this sheet, and made up this, and sent out the bills.

Mr. Stockton: But those sheets are not authenticated; that is my objection.

The Court: They are authenticated so far: he has testified that they are the sheets kept in the business or at that time of this shipment.

Mr. Stockton: Yes, sir, but I think that the testimony as to the first of those sheets is inadmissible until it has been authenticated as to the manner of their making.

The Court: You mean, the persons who made the sheet itself should be called?

Mr. Stockton: Anybody who made the entry. I understand the rule to be, that the person who makes the entry—you have got to [fol. 83] go in those records to a person who has personal knowledge of them, and who made the entry, and who knows that it was true, and from then *or* you can build your records up. I think that the rule is hard and fast in this State, your Honor.

Mr. White: Your Honor, if a man were dead, according to that we could never prove anything.

Mr. Stockton: If he were dead, you can prove his handwriting.

Mr. White: I will prove that he knows the handwriting of the man who put these signatures on every one of these.

Mr. Stockton: But that rule only applies in the case of a man who is dead.

Mr. White: I have not offered these in evidence. I do not see any occasion for this.

Mr. Stockton: Just so long as he does not testify from them, it is all right.

By Mr. White:

Q. This sheet, egg report of receipts, shows the total number of eggs received in the lot number 1632 and the day they were sold?

A. Yes, sir.

Q. And what was received for them?

Mr. Stockton: I object to the form of the question. I do not mind his saying that it purports to show, but I do not want it to appear on the record as an admission against us, unless I object to it. I merely do not want it to constitute an admission.

[fol. 84] The Court: Let me see that sheet. Do you offer this in evidence now?

Mr. White: I was going to offer it in evidence now, but if I am going to be met by these objections every moment, I am going to prove the sale of every one of those, out of this other book.

The Court: He is quite within his rights in making all these objections. He is seeking to compel you to prove every item that makes up your case, and you must prove it in the proper and legal way, and as long as the objection has been made, and you have the facilities for proving these sales, I think you better prove them.

Q. Mr. Ferris, on this sheet marked "Egg report of receipts," are there also shown the sales?

A. Yes, sir.

Q. Will you take the number shown on this sheet of the first egg sale and state when it was sold?

Mr. Stockton: I object.

Q. State what that sheet says as to when it was sold. When was the first sale?

A. March 4th.

Mr. Stockton: I object to the reading from the sheets until they have been properly authenticated. That is my objection.

The Court: His contention is, and that is what you want to address yourself to, that before this man can give any testimony to a summation in this sheet of sales, that the sales themselves in the [fol. 85] proper way must be proven, either by the person who actually made the sale or by the person who actually made the entry of the sale and who knows of the sale.

Mr. White: Your Honor, my contention is simply this: here is the original record taken from the files of Brown & Company showing all these sales. This book contains more than those particular sales, and I am going to pick them out one by one, and I am asking him to get the number of the first one shown on that sheet.

The Court: But that is not the objection that you are answering. He wants you to prove every sale.

Mr. White: I am going to prove that by this other book, when I get him to get the number of it, so he can find it in the book.

Q. Will you select out of the book you have got in your hand, the large one, the sales of the eggs in this consignment?

The Court: I suppose what the counsel on the other side is endeavoring to have you do is, to show, if you have shown, the receipt of these eggs, and then their disposal, and how they were disposed of, and by whom they were disposed of. They were sold assuredly, by whom were they sold, when were they sold, what did they realize, who sold them, where was the entry, and who made the entry?

Mr. White: Your Honor, according to his own statement made [fol. 86] here time and time again this morning, that has nothing to do with it. The question is, what was the value of the eggs when they arrived here.

Mr. Stockton: Then why put in this evidence?

Mr. White: Because I do not know what it may lead to, and it is perfectly proper evidence for me to put in my case.

The Court: Are you now on the point where you are endeavoring to show the market value at which these eggs were sold.

Mr. White: I was going to show what these eggs were sold for and when they were sold, that is all.

The Court: Who is the person who has knowledge of the sale of these eggs and the market value at that time?

Mr. White: I will prove the market value by another party. I want to prove by this gentleman that these eggs were sold for these particular prices. If your Honor says that is not necessary, very well, we will not go any further on those lines. The rule of damages, as I understand it, is the difference in market value between the value of those eggs on the day they should have arrived and the value on the day that they did arrive.

The Court: That is the measure of damage.

Mr. White: I want to show that these eggs were sold at the market value on that day.

[fol. 87] The Court: You have a shipment of eggs. They are two kinds of eggs according to your own testimony. One is firsts and the other is seconds. This was a shipment of seconds.

Mr. White: No, your Honor; this is a shipment of firsts.

The Court: Extra firsts and firsts; at all events, two divisions of them, and they were shipped on a certain day, and they were not received until a certain day here, and if they were received, your contention is, on a certain day within 30 hours after they were shipped, the market 30 hours after the shipment in New York, where they were destined and sent, was such and such a price, and they did not arrive until a certain other time later, when they were sold, and the market price for this particular kind of eggs on that day was such and such another price, and the measure of damage is the difference between the market value on the day they should have arrived and the day that they were sold at the deferred date. That is, as I understand the rule.

Mr. White: I will withdraw this witness for a moment.

JAMES F. CAHILL, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. White:

Q. Mr. Cahill, what is your business?

A. Manager of the egg department for Armour & Company, New York.

[fol. 88] Q. Where were you employed in February, 1918?

A. H. L. Brown & Company, Greenwich Street, New York.

Q. What was your business at that time?

A. At that time assistant egg manager of the egg department of H. L. Brown.

Q. Is your business to keep posted on the market value of eggs from day to day?

A. Yes, sir.

Q. Do you know what the market value of eggs was on February 25, 1918?

A. Yes, sir.

Q. And do you remember at this time what the market value was at that time, or have you had occasion to refresh your memory on the matter?

A. I have refreshed my memory on the matter.

Q. Is there a standard paper published in the City of New York which gives the market value every day of produce?

A. Yes, sir.

Q. Well recognized amongst the trade?

A. Yes, sir.

Q. And relying upon as furnishing the price of eggs from day to day?

A. The Mercantile Exchange, and all the members of the produce trade consider it the official quotation prices of that day, the day issued.

Q. What is the name of that publication?

—. The Producers' Review, price current.

Q. Is that the paper you have in mind (handing paper to witness)?

A. Yes, sir.

Mr. Stockton: I object to that form of question, your Honor.

The Court: Is that the paper he has in mind?

Mr. Stockton: I do not know whether he means a paper that he refreshed his recollection by, or whether that is a copy of the Pro-
[fol. 89] ducers' Price Current, whatever the name is.

The Court: What is the paper that you have been shown?

Q. What is that paper, Mr. Cahill?

A. Why it is a paper published and issued every day by the Irma Barry Company.

By the Court:

Q. What is it called?

A. The Producers' Price Current. It gives the quotation or quotations rather, of butter, cheese and eggs and other farm products. It is issued at one o'clock every day.

Q. Is it used in the trade or in the business?

A. Yes, sir.

Q. For what purpose?

A. It is a basis for settling all prices of the products contained on that sheet that are sold on that day.

Mr. Stockton: Your Honor, I hesitate to make this technical objection, but I am compelled to rely on all my technical objections

in this case; I am going to object to the entry of that particular paper in evidence, if he offers it, and to its use for refreshing his recollection, on the ground that it is not properly authenticated as a copy of the Producers' Price Current he has testified to.

Q. Let me ask you, your business is the butter and egg business, is it?

A. Yes, your Honor.

Q. Is there a Chamber of Commerce or a Board of Trade regulat-
[fol. 90] ing the butter and egg business in the City of New York?

A. We have an exchange where we trade back and forth.

Q. What is the name of that exchange?

A. Mercantile Produce Exchange.

Q. Does that Mercantile Produce Exchange issue from time to time or regularly at fixed times, statements showing the prices current for butter and eggs?

A. You mean, do they personally? Does the exchange issue it?

Q. Yes.

A. No; this is what they use entirely.

Q. The exchange uses that?

A. Yes, sir; this is posted in the exchange every day.

Q. This paper that you are now referring to contains the current prices of butter and eggs?

A. Yes, sir.

Q. And it is so recognized by the Mercantile Exchange and by the trade generally?

A. By the trade generally.

Q. You know that of your own knowledge?

A. Yes, sir.

Mr. Stockton: I make no question of the fact that that paper that he produces does set forth those reports. My objection is addressed to the fact that this is not an authenticated copy of that paper.

The Court: You mean, that the publisher or the printer has not been called?

Mr. Stockton: Exactly, your Honor, and I warned Mr. White I was going to be compelled to put him to his strictest proof.

Mr. White: Your Honor, this assumption is that there was a
[fol. 91] separate copy of this published for some other purpose. This is the regular edition published from day to day.

The Court: His objection is, that you have to prove that. As long as he makes the objection, you have to prove that it is the regular edition, and that it is the real paper. What is to prevent some person presumably from printing a paper called the price current without any authority? You would have to call someone from the paper to say that that was their regular issue, a copy of their regular issue that day, whatever day it is.

By the Court:

Was there any other way of ascertaining the prices or the value of eggs besides that paper? Did you make sales?

A. On this particular day your Honor?
Q. Yes.
A. On this particular day?
Q. On that day or any other day in that month?
A. Have I the permission to look through this file?

Mr. White: Wait a minute. I did not catch that question, your Honor. Maybe I can help out.
(The last few questions read.)
Mr. White: What you want is that other book; this is not the one you want.
The Witness: Yes, I want the other one (book handed witness). Your Honor I have sales' tickets here of the same date as this paper here in question.
[fol. 92] Q. What is the date of the paper that you refer to?
A. It is February 25th.

The Court: Is that the date that you claim these eggs were sold?
Mr. White: The day the eggs should have been here.
Mr. Stockton: I take exception to that statement, your Honor. He is not testifying, as I understand it.
The Court: That remains to be determined, but on this particular date, February 25th——
Mr. White: February 25th was the date we claim—I will correct my statement—which would have been 30 hours after delivery.
The Witness: I have one sales ticket here for eggs at 53 cents.

Q. What kind of eggs were they?
A. Fresh gathered firsts.
Q. Was that the same kind of eggs that are in the shipment in question?
A. Yes, sir. I have another ticket here that bears me out in this quotation on this sheet, another sale being made on the 25th at 53 cents.

Mr. Mr. Stockton: Might I ask him a question or so with respect to that paper he is refreshing his recollection from, your Honor?
The Court: Yes.

By Mr. Stockton:

Q. Mr. Cahill, did you personally make the sales on those dates?
A. No, I did not.
[fol. 93] Q. You did not make them?
A. No.
Q. Did you make the entries in that book?
A. No, I did not.

By Mr. White:

Q. Are you familiar with the handwriting on the entries there, the initials?

Mr. Stockton: Your Honor, I think that question is beside the point, because, unless it is proven the witness is dead, it is entirely irrelevant; the mere proof of the handwriting, unless it is shown that for some reason a witness cannot be produced.

The Court: Of course, the witness, if he cannot testify himself of his own knowledge of these sales, there must be some proper proof that the paper represents actual sales.

Q. Mr. Cahill, what is that book you have got in front of you there?

A. It is a book of sales' tickets.

Q. And where does that book come from?

A. It comes from H. L. Brown Company originally.

Q. Did you have that book taken out of the files?

A. Yes, sir.

Q. For what purpose?

A. To refresh my memory as to the price of eggs through the week including February 25th.

Q. You mean as to the sales made by Armour & Company on February 25th and other days, and what they got for eggs?

A. Exactly, yes, sir.

[fol. 94] Mr. White: I do not know, your Honor, if that is not perfectly proper evidence, what in the world we can get. I will telephone down and bring the newspaper man up here, though.

The Court: Have you the person who kept that record for Brown?

Mr. White: The Brown people, your Honor, are out of business, have been out of business.

The Court: Why don't you show those things?

Q. What became of the Harold L. Brown Company?

A. Why, the business was closed up a year ago.

Q. And their records, where did they go to?

A. As far as I know, they were filed away in Jersey City, at an office we have there.

Q. And under whose control are they now?

A. Mr. Ferris.

Q. Mr. Ferris, who is employed by Armour & Co.?

A. Yes, sir.

Q. In other words, Armour & Company today have all the old records of the Harold L. Brown Company?

A. Yes, sir.

Q. So far as you know?

A. Yes, sir.

Q. And this is part of those records?

A. Yes, sir.

Q. And they were gotten out for you to find out the sales made of eggs on a certain time in February?

A. Yes, sir.

Q. Where is Mr. Brown?

A. Why, at present he is in New York.

Q. How long has he been here?
A. Six or eight months.
[fol. 95] Q. Did he personally himself sell eggs, or were they done by others?
A. In this particular case?
Q. Yes.
A. No; they were done by others—made by others, rather.
Q. In other words, he was simply head of the Harold L. Brown Company?
A. In Chicago. At that time he was not in New York.
Q. He was not in New York?
A. No, sir.
Q. The Harold L. Brown Company was a Chicago company?
A. His headquarters were in Chicago.
Q. But they had a place of business here in New York City?
A. New York City.
Q. What was the market value of eggs on February 25, 1918, if you know?

The Court: This kind of eggs.

A. This kind of eggs 53 cents.
Q. Are you familiar with the market value of eggs on March 4, 1918?
A. March 4th, yes.
Q. And you have refreshed your memory in the same way?
A. Yes, sir.
Q. That is, by consulting the Producers' Price Current?
A. Yes, sir.
Q. Which you have already testified to the Court as well recognized amongst the trade?
A. Yes, sir.
Q. And also as to sales made by Armour & Company on March 4th?
A. Yes, sir.

Mr. Stockton: Might I just put a question or so to him, there, your Honor, as to his qualification on that point? I do not think [fol. 96] his memory was properly refreshed. That is the reason I would like, if I might be permitted, to put a few questions.
The Court: Very well.
Mr. White: Your Honor is going to permit him to break in on my cross-examination?
The Court: He has a right to cross-examine where a man is called as an expert on market value, before he is permitted to give his answer.
Mr. White: Yes, your Honor, but he has already cross-examined him.
The Court: But not as to February 25th.

By Mr. Stockton:

Q. From what paper did you refresh your recollection, Mr. Cahill?
A. From the Producers' Price Current.

Q. From that paper that was here just a minute ago?
A. Yes.

The Court: You make the same objection as to the paper?
Mr. Stockton: I make the same objection.
The Court: And I will take it subject to them confirming the official character of the paper.
Mr. Stockton: Exception.

By Mr. White:

Q. When you say the same paper, do you mean the same paper [fol. 97] of the same date or different dates?
A. The same paper of the same date February 25th.
[fol. 97] Q. Yes; but I am speaking now as to the market value on March 4th? Do you use the February 25th paper or the March 4th?
A. No; I use the March 4th.
Q. I just want to get that quite clear. And the market value of eggs on March 4th was what?
A. 36 and one-half cents.
Q. That would be before you deduct the commission?
A. Yes, sir.
Q. Do you know what the commission is for selling eggs?
A. At that time it was a cent a dozen.
Mr. Stockton: I object to this question on the ground it is irrelevant; certainly the commission plays no part in the damages in this case.
The Court: Are all eggs sold on a commission?
Mr. White: Eggs are sold at the market, commission deducted, and the proceeds transmitted to the consignor.
Mr. Stockton: The market value included the commission. So that it is not fair for them to try to deduct the commission in this case, especially when it appears that Harold L. Brown and Armour & Company and the Kentucky Creameries were all one proposition. Now, they are trying to put a commission into their pocket because they sold through their left hand instead of their right hand.
Mr. White: However, just as you say about that; I have asked a question and he has objected.
[fol. 98] The Court: Leave out the commission.
Mr. White: That is all, your Honor, of this witness. Of course, I want to, as soon as I can get that publisher up here——

By the Court:

Q. As I understand it, the figure that you have given us with regard to March 4th is from your knowledge of the business and the statements appearing in the trade paper, the Producers' Price Current?
A. Price Current.
Q. Showing sales on that day?
A. Yes, your Honor.

Q. And that you say for that day was 36 and one-half cents a dozen?
A. Yes, sir.

Cross-examination.

By Mr. Stockton:

Q. Mr. Cahill, you were speaking from your own memory when you said that the prices were what you have just testified?
A. Speaking from my own memory?
Q. From your own recollection, that is right, isn't it?
A. Yes.
Q. You are sure of that?
A. Why, I have refreshed my memory from my price current and my sales' tickets.
Q. Your memory having been refreshed by looking over these papers, you have an actual personal recollection of what the price was on those dates?
A. Yes.
Q. You looked over those papers pretty thoroughly, did you?
A. I did.
Q. Have you any idea what the price was on March 15th?
A. No.
[fol. 99] Q. Have you any idea what the price was on February 29th?
A. February 29th?
Q. Yes.

The Court: You are speaking of that year?
Mr. Stockton: That year, yes, sir.

A. Why, I would say about 53 cents.
Q. About 53 cents?
A. I would say about that.

Redirect examination.

By Mr. White:

Q. Mr. Cahill, when you say 53 cents you mean, that is your opinion now without having refresh your recollection?
A. Without having refreshed it, I don't know.
Q. In other words, at this time——
A. It may be 43, 33. I couldn't tell you, four years ago.

Recross-examination.

By Mr. Stockton:

Q. In other words, you have not a clear recollection?
A. I said about.
Q. About 53 cents?
A. Yes, sir.

By Mr. White:

Q. Yes, but Mr. Cahill, in order to be able to testify as to the value of eggs on any particular date, you would feel it necessary, would you, to refresh your memory by the sales' tickets and the price current as to what eggs actually were selling for on that day?

A. I would have to.

Q. So that when you say 53 on February 29th, that is your opinion without having refreshed your recollection?

A. That is just rough guess.

[fol. 100] By Mr. Stockton:

Q. You just testified you did refresh your opinion, haven't you?

A. On what?

Q. You looked over those first and examined the price current very carefully?

A. Yes, sir, on the date you asked me.

Q. You did on the 25th?

A. Yes.

Q. And you did on the 4th of March?

A. Yes.

Q. But you did not look at any intermediate dates?

A. No.

Q. Just on those two days are the only ones you did look?

A. I probably glanced through a day each side of those dates.

Q. And you have an independent recollection now as to the fact that on February 25th and March 4th there was a certain market value; you remember it?

A. Oh, yes.

By Mr. White:

Q. Mr. Cahill, I furnished you with the copies of the Produce Exchange that you have in front of you?

A. I don't get your question.

Q. Did I show you those particular copies of that paper?

A. Why, we have them on file.

Q. The ones that are in front of you now, what dates do they cover? Was the 29th of February there?

A. No, I don't see it.

Q. Nor February 28th there?

A. No, sir.

Q. In other words, I just furnished you two or three around the 25th of February, and then at the time two or three around the 4th of March?

A. Yes.

By the Court:

Q. Do you know if there was any 29th of February that year at all?

[fol. 101] A. Why, I don't know if there was or not, but if there

had been, of course, it would have carried the quotation on the 28th.

By Mr. Stockton:

Q. And that, as nearly as you remember, would have been around 53½ cents?
A. As nearly as what?
Q. As nearly as you remember, would have been around 53½ cents?
A. I said it might be about 53 cents.
Q. That is your best recollection?
A. Yes, without looking at it.
Q. And you were acquainted with the prices at those times, weren't you?
A. Yes.
Q. Thoroughly?
A. Yes.

Mr. White: We will have a man from the publisher's here in ten minutes. I suggest, your Honor, that we might take half an hour's recess.

Mr. Stockton: I tell you what I will do: I will accept the prices he has said, every one of them, so as to do away with that.

Mr. White: Your Honor, I will not consent to it, because that is another species of actions on the part of my friend. He is trying to get in here that these eggs were worth 53 cents on February 28th or 29th.

The Court: He has offered to accept those figures that this man has given. You do not wish to accept his offer?

Mr. White: If he says he will accept the figures of February 25th and March 4th, all right, but as to any other date——

[fol. 102] By Mr. Stockton:

Q. What were the figures for February 25th?
A. 53 cents.

Mr. Stockton: I have another reason why I think the date of February 25th is immaterial, your Honor, so I am perfectly willing to accept that figure. In other words, my point is, the declared valuation in the Express receipt gives a top limit in this case.

The Court: That is another thing. On the question of market value, you accept the evidence of this witness.

Mr. Stockton: Yes, sir, I will do that.

The Court: He was called as an expert here as to market value that the market value on the 25th day of February, 1918, for these kinds of eggs was 53 cents a dozen.

Mr. Stockton: That stipulation is solely for this case, your Honor.

Mr. White: I was going to say, in order to avoid putting the newspaper man on the stand, I will ask my friend if he will stipulate the price of eggs on the 26th and 27th as shown on this.

Mr. Stockton: No; I will not stipulate that. I am perfectly willing to take what is in.

Mr. White: I am going to prove this by the other man. I am just asking you, here are the prices——

Mr. Stockton: Your claim is, it should have gotten in on the 25th.

[fol. 103] Mr. White: Yes; but still if the court should say, if they got here on the 26th it would have been sufficient, we would not have any proof of what the eggs were on the 26th.

Mr. Stockton: Let us examine this witness. He said he looked one day to each side of it.

The Court: If you want to examine with regard to the 26th or 27th first, examine him.

Mr. Stockton: Not by that paper, though. Just let us get his independent recollection.

By Mr. White:

Q. Mr. Cahill, can you at this time testify as to the market value of eggs in the City of New York?

The Court: Of this kind of eggs.

Q. Of this kind of eggs on February 26, 1918, without refreshing your memory?

A. Why, no, I could not.

Q. I show you a copy of the Producers' Price Current of February 26, 1918 (handing paper to witness).

Mr. Stockton: Objection.

The Court: The same objection that you made previously.

Mr. Stockton: Yes, sir.

The Court: I overrule your objection on his statement that he will produce the publisher or person connected with the paper.

Mr. Stockton: All right, sir.

A. February 26th, 53 cents, 52-3.

[fol. 104] Q. 52-3; what do you mean, 52-3?

A. 53 cents probably; 52 probably to 53 asked.

Q. 52 to 53 asked. Can you testify to the market value of eggs on March 1st without refreshing your recollection?

A. No, sir, I could not.

Q. I will ask you to refresh your recollection by the Producers' Price Current?

Same objection, ruling and exception.

Mr. Stockton: Where did you get that paper? Did you get it from your files?

Mr. White: This paper was furnished to us by the publisher.

Mr. Stockton: That is, you can vouch for that yourself.

The Court: One moment, gentlemen. The witness is asked a question.

Mr. Stockton: I would do away with the proposition, if he can vouch for that paper himself.

Mr. White: I will vouch for it.
Mr. Stockton: All right.
The Court: What is the answer?

A. 36 cents.

The Court: It is stated by the counsel for the plaintiff, as I understand, that this paper was procured from the office of the publishers of the paper.

Mr. Stockton: And I will withdraw my objection to the matter of authentication of the paper.

Q. Then I will ask the witness what the market value on March 2nd and March 3rd was after refreshing his recollection in the same way?

[fol. 105] A. March 2nd, 35½, 36 cents. What was the other date?

Q. The 3rd, if it is there?

A. I don't find it here.

By Mr. Stockton:

Q. Now that you have looked at this paper, you have a vivid and keen recollection on what the price was on those days?

A. Yes, sir.

Q. It is strong; you would not forget that in ten minutes?

A. Why, I don't think I would.

Q. Hadn't you looked over these papers before? Didn't you say your counsel had showed that to you before you came for trial?

A. I don't remember saying so.

Q. Your counsel did not go over these papers with you at all?

A. Those particular papers?

Q. Yes, those particular ones?

A. I don't think he did.

Q. And you had not looked over them before you came to this trial at all?

A. Well, I have occasion to look over these things quite often, not these paticular dates, but I might have occasion every day perhaps to go back.

Q. And he did not get out those particular papers and show them to you to see if they refreshed your recollection before this trial?

A. Personally?

Q. Yes.

A. No.

Q. Did some one in his office?

A. No.

Q. Did you get out those papers yourself?

A. Mr. Ferris got them out.

Q. Did he show them to you?

A. They were where I could see them; yes, sir.

Q. Did you look them over?

A. I did.

[fol.106] Q. You have testified you did look them over to refresh your recollection, didn't you?
A. Yes.
Q. How did it happen it did not refresh your recollection then well enough so that you could remember the prices with a vivid and keen recollection, if it does now?
A. I don't quite get your question.

Mr. Stockton: I will withdraw the question. Never mind.

By Mr. White:

Q. Mr. Cahill, you were only asked to refresh your recollection as to the market value of the eggs on February 25th and March 4th; am I correct?
A. Yes, sir.

JAMES L. FERRIS, recalled.

Direct examination.

By Mr. White:

Q. Mr. Ferris, the sheet of paper in front of you there marked "Egg report" contains a full transcript of the records in Armour & Company regarding the shipment of certain eggs from Louisville, Kentucky, to Harold L. Brown, on February 23rd, does it?
A. Yes, sir; this is Harold L. Brown Company's record.

Mr. White: I offer that record in evidence.
Mr. Stockton: Objection, your Honor, because the things from which that was copied have not been authenticated in any manner [fol. 107] at all. He says that he copied it from other papers. The other papers themselves have not been authenticated at all.

By the Court:

Q. Did you copy the entries on that sheet yourself?
A. Yes, sir, from the sales tickets.
Q. This was the report kept by Harold L. Brown Company?
A. Yes, sir.
Q. Of the disposition of this shipment of eggs?
A. Yes, sir.

The Court: I will allow it.
Mr. Stockton: Exception.
Marked Plaintiff's Exhibit E.

Cross-examination.

By Mr. Stockton:

Q. Mr. Ferris, you copied these from some other sheets?
A. Yes, from the sales tickets.

Q. Did you personally make out the sales certificates?
A. No.
Q. Did you make the sales that those sales certificates purport to record?
A. No.
Q. Have you any personal recollection at this time as to anything that this sheet purports to show, referring to Plaintiff's Exhibit E?
A. It shows the disposition of the eggs received from that car.
Q. Have you any personal recollection as to what those eggs were sold for?
A. From the sales tickets in front of me——
Q. Wait a minute. Do you personally know what they were sold for?
A. Yes.
Q. Did you take part in the sale?
A. No.
Q. How do you know?
A. Because the sales made by our Sales Department——
[fol. 108] Q. Any information you have is derived from that sales ticket?
A. Yes, sir.
Q. Entirely from that?
A. Yes, sir.

Mr. Stockton: I renew my motion, your Honor, to strike this out of evidence.

COLLOQUY BETWEEN COURT AND COUNSEL

By the Court:

Q. Whenever there was a sale made, there was a sales ticket made also?
A. Yes, sir.
Q. And this book before you, does it contain all the sales tickets relating to the sale of the eggs shown in detail on Plaintiff's Exhibit E, that sheet?
A. Yes, sir.
Q. And you transcribed on that sheet all the sales of that shipment of eggs from these sales tickets in front of you?
A. Yes, sir.
Q. And the sheet marked Plaintiff's Exhibit E, was that a part of the book kept in due course of business by Harold L. Brown Company?
A. Yes, sir.
Q. What was the name of that book?
A. That was a receiving record.
Q. What did that book show?
A. It showed the receipts of every shipment received by the Harold L. Brown Company.
Q. Every shipment of eggs?

A. Every shipment of eggs, yes, sir.
Q. During the year 1918?
A. Yes, sir.

The Court: I will allow it.
Mr. Stockton: Exception.
Mr. White: As I understand it, your Honor, there is no necessity for me to call the newspaper publisher here. They have waived and stipulated.
[fol. 109] Mr. Stockton: That is right.
Mr. White: I offer in evidence the instrument from Armour & Company to the plaintiff in this case.
Mr. Stockton: Objection, on the ground that it is not properly proved.
Mr. White: It is under seal.
Mr. Stockton: Is Armour & Company a domestic corporation? I understand it is a Kentucky corporation. It is not testified to by Jonte or by anybody in the depositions there.
Mr. White: Your Honor, the answer does not deny it at all.
Mr. Stockton: I think it denies knowledge or information.
The Court: Is it admitted or denied?
Mr. Stockton: It denies knowledge or information.
The Court: Where is the allegation of the assignment? Seventh paragraph, they deny knowledge or information with regard to the assignment.
Mr. White: Your Honor, I offer in evidence an instrument under seal assigning this claim to the plaintiff in this case.
Mr. Stockton: It is not proved by whom it was executed, not proved it is the seal of the corporation.
Mr. White: It proves itself.
The Court: What is it that you particularly object to with regard to this paper?
Mr. Stockton: I object that it is not proved by whom it was executed. It is not proved that it is the seal of Armour & Company. It is not acknowledged. It is not proved that the man who exe-
[fol. 110] cuted it had authority to execute it. It is nothing but a sheet of paper on which appears some writing and what purports to be a seal of some corporation, signed by some man. We do not know who he is or what his authority is. I think it is absolutely inadmissible.
Mr. White: Your Honor, I suggest that that paper on its face, as the plaintiff in this action, sworn to by the plaintiff that he is the assignee, and the assignment executed by the assignor, is certainly as much proof as should be required in a case of this kind. The plaintiff himself swears that he is an assignee of this claim.
Mr. Stockton: There is no oath that he executed any such instrument.
The Court: The point is, he claims that there is no specification as to the seal or acknowledgment by the Vice-president.
Mr. White: Your Honor, the plaintiff swears that this claim was assigned to him, and he produces now——

The Court: I know, but the plaintiff might swear that it w assigned to him, and yet it might be a faulty assignment. He is objecting to the f m of the paper. It is not sufficient as an assignment, if it is questioned.

Mr. Stockton: I thought there would be no question at all on that, your Honor. It is so clear, as I see it. This is a corporation, the Kentucky corporation executing it outside the state, it is not even acknowledged before a notary public. I cannot see any possible ground fo its admission.

[fol. 111] The Court: It is objected to as not being a legal document, a legal assignment, not properly authenticated.

Mr. White: Here is an affidavit they submitted, that this action was brought by the plaintiff on an assignment of claim, sworn to by themselves.

The Court: What is that?

Mr. White: Here is an affidavit executed by one of the counsel for the defendant, setting forth that this action was begun by the service of summons and the voluntary appearance of the defendant on March 3, 1920. The complaint was served so and so. This action was brought by the plaintiff on an assignment of claim, admitting that this is the proper assignment.

The Court: They admit that the plaintiff has brought it upon an alleged assignment of claim, but when you seek to offer it in evidence, then they are entitled to make their objection. I would not say offhand that that objection was a valid objection at this moment, but you look it up during recess, and I will then pass upon it.

Adjourned to Monday, May 22, 1922, at 10 o'clock A. M.

Monday, May 22, 1922—at 10:00 A. M.

Trial continued.

Mr. White: Your Honor, when we djourned on Friday, the question was as to the admission of an assignment. . have looked up [fol. 112] the law, and while I think that assignment is perfectly good, the only point in it would be, whether he would be protected under an assignment of this kind.

In other words, suit had to be instituted within two years, and of course if the Armour & Company itself had not assigned this claim, it could not institute a suit now. However, I am expecting a witness here in a moment, but in the meanwhile I offer this assignment in substitution for the other one, which is executed before a notary public.

Mr. Stockton: I object, your Honor. I think this one was executed, however, subsequent to the commencement of the action. Are you going to prove its execution?

ARTHUR F. BARCLAY, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. White:

Q. What is your business, Mr. Barclay?
A. Credit man for Armour & Company.
Q. How long have you been with the Armour & Company?
A. Twenty-eight years.
Q. Are you familiar with the signature of the president of the Armour & Company, Mr. White?
A. He is vice-president.
Q. Are you familiar with the secretary, Mr. Willetts?
A. Yes, sir.
Q. And are you familiar with the seal of the Armour & Company?
A. Yes, sir.
[fol. 113] Q. And you have seen their writing often?
A. Very often.
Q. And have very many of their signatures in your possession as credit man?
A. Yes, sir.
Q. I show you a paper signed "Armour & Company by White, President," and ask you if you recognized that handwriting (handing paper to witness)?
A. I do.

Mr. Stockton: I object. Can I cross-examine him just a minute as to his knowledge of Mr. White's handwriting?
The Court: Yes.

By Mr. Stockton:

Q. Where are you located, in New York or Kentucky?
A. Yes, sir, 120 Broadway.
Q. Have you ever met Mr. White?
A. Many times. I was with him in Chicago for nearly four years, in the Chicago office.
Q. Does he have his offices in Chicago?
A. Yes, sir.
Q. Or in Kentucky?
A. In Chicago.
Q. In Chicago?
A. Yes, sir.
Q. And how do you know whether or not he is President of Armour & Company of Kentucky?
A. I have been notified by the firm that he has been made President.
Q. That is the only way you know?
A. Yes, sir.

Q. You have never seen any copy of the minutes of Director's meeting at which he was elected?
A. Certain minutes, yes, showing—
Q. Of a meeting at which he was elected president?
A. A copy was in our paper named "The Armour Magazine."
[fol. 114] Q. A copy of the minutes, but you have never seen the original minutes?
A. No, sir.

By Mr. White:

Q. Have you got papers in your possession signed by Mr. White authorizing or appointing you as credit man?
A. No; appointing me as power of attorney.
Q. Power of attorney?
A. I have it in my pocket (producing paper).
Q. Do you know the signature of the secretary of the company?
A. Yes, sir.
Q. Do you know the signature there?
A. George M. Willetts. George M. Willetts has been my superior officer for a number of years.
Q. Is that his signature?
A. Yes, sir.
Q. How about the seal of the company? Is that the seal of the company?
A. Yes, sir.
Q. Are you familiar with it?
A. Yes, sir.

Mr. White: I offer this paper in evidence, your Honor. This paper is acknowledged before a notary public.
Mr. Stockton: Objection on the ground that it is not properly authenticated.
The Court: I will receive it.
Mr. Stockton Exception.

(Marked Plaintiff's Exhibit F.)

Mr. White: Your Honor, there is no affirmative denial that the Armour Company is a corporation, and I do not think that I am required to prove it, but in order to avoid any technicalities whatever in the evidence—

[fol. 115] The Court: Do you admit it is a corporation?
Mr. Stockton: Yes.
The Court: It is admitted.

JAMES L. FERRIS, recalled.

Direct examination.

By Mr. White:

Q. Mr. Ferris, based on the assumption that the market value of eggs on February 25th, 1918, was 53 cents a dozen, have you calculated the market calue of the 522 cases of eggs?

A. Yes, sir.

Q. What was the market value based on 53 cents?

A. $8,299.80.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Stockton: Was that on February 25th? Is that the date you asked him about?

Mr. White: Yes.

Mr. Stockton: Your Honor, I move to strike out the answer to that question, because I believe that under the law in this case—wait a minute; maybe I haven't got his figure straight. What did you say the gross value of the eggs was on February 25th, according to your calculation?

The Witness: $8,299.80.

The Court: That was on eFbruary 23rd, wasn't it?

Mr. White: Your Honor, I simply claim the loss without specifying how it was arrived at. I am simply giving this information so that the jury would not have to do any calculating.

[fol. 116] The Court: I think someone testified that that was the value at the time you shipped it.

Mr. White: Yes; that is in the evidence, your Honor. I simply want to make the calculation here by one witness.

The Court: That was on February 23rd, wasn't it?

Mr. White: Yes, sir, that is the day that the eggs left Louisville. They were due to reach here in 30 hours or on February 25th.

Mr. Stockton: I move to strike out, your Honor, as based on the fact that the valuation shown in this Express receipt or alleged express receipt is $8.143; so that I do not think for the purpose of proving damages—it has been repeatedly held by the highest court that the shipper is held to the valuation placed in his express receipt; so that I think in this case for the question of proving damages for delay, the top valuation which he can claim for those eggs is the valuation claimed in the express receipt. He may, if he proves an unreasonably delay and a loss in a market value below that valuation specified in the express receipt, recover for that difference, but I do not think, having declared a value on the express receipt for $8.143, he can show on a certain day when they were due to arrive they had a real valuation in excess of that because the charges are computed upon a basis of the valuation specified in the receipt.

[fol. 117] The Court: I think that is the amount referred to in the deposition, isn't it, $8.143?

Mr. White: Your Honor, that is what they paid for the eggs in

Louisville, but the express charges in this case are based, as stated in the answer here, that the value did not exceed 50 cents a pound. If these eggs had entirely been lost, it is possible that we would have been restricted to the valuation we put on them; but this is a case of delay, and the rule of damages is well settled and well established by all the decisions, that the difference in value is between what they were when they should have been gotten here and when they did get here. While they put a valuation on these eggs at Louisville, the charge was not based on that valuation. It was based on "not exceeding 50 cents a pound." I have put in my memorandum here a decision of the Court of Appeals of this state which has been affirmed by the Supreme Court of the United States.

The Court: What does that hold? What case is it?

Mr. White: I am citing from Burns v. Pacific Railroad, 226 N. Y. 534, affirmed in 255 United States 317, where it says that the validity of a contract limiting a carrier's liability to an agreed value does not depend upon the relation of that value to the actual value. It rests upon the proposition that by freely and voluntarily electing to contract for carriage at a rate of compensation agreed upon and an [fol. 118] agreed value, the shipper is estopped to claim a higher value in case the shipment is lost or destroyed. Under this proposition, and the authorities, the agreed or released valuation is valid and effective as to the question of loss only, when it is related to the rate charged for transportation. A shipper cannot be estopped by an agreement or declaration concerning value, which in no way or extent affected the tariff or conduct of the carrier. An essential choice of rates must be made to appear before a carrier can successfully claim the benefit of the agreed valuation, limitation and relief from the full liability. In other words, if we had put a higher value than 50 cents a pound on this, we would be estopped, of course, because then we would represented that these eggs were of greater value than the limitation in the rates fixed and filed by them with the Interstate Commerce Commission, which depends on $50 for 100 pounds or 50 cents a pound, and that is stated in their answer.

Mr. Stockton: Your Honor, of course we could not know, when our answer was filed, that on this express receipt, of which we have no copy ourselves, appeared the figures $8.143 as the declared valuation for the shipment. In the absence of any proof that that valuation was more or less than 50 cents a pound, the Express Company in its tariffs was bound to assess charges at the declared valuation, and your Honor can take judicial notice of all the terms and pro- [fol. 119] visions of those filed tariffs. It has been repeatedly held, and I have, to refresh your recollection, here a copy of the tariffs, a certified copy, which I will be glad to show your Honor to show that there was an alternative rate in this case. But he has shown nothing, to begin with, that the valuation on here was not in excess of 50 cents a pound, because there has been no testimony at all as to the weight of this shipment, and under the circumstances I think he is absolutely concluded by the valuation which they have voluntarily put on the express receipt. That is their maximum limit of the value so far as this company is concerned.

Mr. White: Your Honor, may I say one word: they have alleged certain things in their answer. If these eggs or if this valuation had anything to do with the rate they fixed on it, that is an affirmative defense, and it is up to them to prove it. I can rebut it, but my case does not depend on that, and here is a very late case, in 171 N. Y. Supplement 322, the court lays down the rule that the difference between the market value when the goods should have arrived and their value at the time of delivery is the rule of damage.

Mr. Stockton: In the absence of a declared value I agree with you, that that is the rule. My position is, that when there is a declared value which is lower than the value which he is seeking to hold the company for on the date of delivery, he is confined to that [fol. 120] declared value, or, in the case of a delay, the difference between that value and the lower market value.

The Court: No, I think not, under that decision in 225 United States which he has just read.

Mr. Stockton: But there were alternative rates in this case.

Mr. White: But it did not affect the rate that we paid on this property. It was 50 cents a pound. If you say that these eggs' weight affected the value here, you put your proof on, and I will meet it.

The Court: I will allow the evidence.

Mr. Stockton: Exception.

Q. Mr. Ferris, those eggs were sold when?

A. March 4, 1918.

Q. And what was received for the eggs?

A. 36½ and 35½ cents.

Q. Amounting to how much?

A. $5,589.27.

Q. What was the difference between their value on February 25th and March 4th?

A. $2,710.53.

Q. Have you calculated the interest on that amount since March 4, 1918?

A. Yes, sir.

Q. What does that amount to?

A. $685.73.

Q. Making a total of how much?

A. $3,396.26.

Q. For how many years did you calculate that interest?

A. That is the balance of the year 1918 and the years 1919, 1920, 1921 and to May 22, 1922.

Cross-examination.

By Mr. Stockton:

Q. All those calculations are based on the assumption that the eggs were worth a certain value of 53 cents a dozen on the date of arrival?

A. Yes, sir.

[fol. 121] Q. They are all based on that assumption?
A. Yes, sir.

Redirect examination.

By Mr. White:

Q. Do you mean on the date of arrival or on the date that they should have arrived?

A. On the date they should have arrived, and the difference between the date they should have arrived and the date of arrival.

Mr. Stockton: Your Honor, I object to the question and move to strike out the answer, because he answered before I got up. It is not proper for him to ask the date they should have arrived. It is not evident that this witness has any qualifications or he can testify as to the date they should have arrived.

Mr. White: Your Honor, I do not want to put anything in the witness's mouth.

The Court: You have asked him specifically as to the value on the 25th of February.

Mr. White: Yes.

Mr. Stockton: Leave it at that.

The Court: The other is a matter of argument.

Mr. White: The question he asked was apt to confuse. His answer was confusing, that is all. If it is understood, that is all right.

Mr. Stockton: My objection is to his getting this witness to testify as to the date the eggs should have arrived, and I object to the question because it does not appear that the witness knew.

[fol. 122] The Court: What was the question you asked him?

Mr. Stockton: I asked him whether the calculations were based on the assumption that the eggs were worth 53 cents a dozen.

The Court: At what time?

Mr. Stockton: I meant on February 25th.

The Court: That is agreed. That is the computation on February 25th?

Mr. White: Yes, your honor, I just wanted to straighten that out.

The Court: And the difference between that valuation and when they actually arrived on March 4th is the basis of the computation.

Mr. White: I will close, your Honor.

Mr. Stockton: You have put all the evidence in you want to put in, Mr. White?

Mr. White: I wanted to offer in evidence, your Honor, those sheets of the current price, but when I came to look for them, I did not know whether they were handed up there or it was like the deposition. I could not find my copy of it. I will offer in evidence, your Honor, a schedule of the Pennsylvania Railroad showing the time between Louisville, Kentucky and New York City.

Mr. Stockton: Objection, not authenticated, irrelevant and immaterial.

Mr. White: I have already proved running time. It ought to be in here in about 30 hours.

Mr. Stockton: How have you proved that?

[fol. 123] Mr. White: Proved it by a witness.

Mr. Stockton: What witness?

Mr. White: Mr. Cahill.

Mr. Stockton: I do not recollect it. I do not recollect a word of testimony as to the running time between Louisville and New York.

Mr. White: Not the running time, but the time that the eggs—the time between Louisville and New York was about 30 hours. That was proved by Mr. Cahill.

The Court: You said something about that celebrated horse having come here in 24 hours.

Mr. White: I said that to the jury, 24 hours, but Mr. Jonte himself testified in the deposition that Mr. Latimer had informed him——

Mr. Stockton: That was stricken out. Do not repeat it to the jury.

Mr. White: The second day after?

Mr. Stockton: That was stricken out.

The Court: Isn't there some way of arriving at such a stipulation on such a question as that?

Mr. Stockton: No, sir, not in this case. We are laboring under enough of a handicap as it is, and I do not propose to assist him in any way to prove the necessary facts of the case.

Mr. White: Your Honor, we are up now against a statement that something in the deposition was stricken out, which I claim was not stricken out, let us dispose of that.

Mr. Stockton: There is where it was stricken out (indicating on deposition).

[fol. 124] Mr. White: All right. Mr. Cahill testified it was 30 hours.

Mr. Stockton: You admit that that was stricken out.

Mr. White: I see that that is so. But, your Honor, how can you prove the running time of the trains going back four years, except by schedule?

Mr. Stockton: He certainly cannot prove it.

The Court: He is objecting. You have to prove those things by the minute requirements in such case made and provided.

Mr. White: Your Honor, I claim that the schedule of the railroad showing the running time of trains is good evidence and proper evidence. In addition to that fact, I claim that Mr. Cahill testified that the usual time for a carload of eggs to come from Louisville to New York was 30 hours. Unfortunately, I did not get a copy of the testimony, or we could read from it.

Mr. Stockton: Your Honor, I am absolutely convinced, because I was watching that particular point, that there is no testimony from any witness on the question as to what the time is.

The Court: Whose testimony was that?

Mr. White: Mr. Cahill. Cahill was the man I put on the stand

to testify about the eggs, and asked him what was the usual time for eggs to arrive here, and he said the running time was about 30 hours.

The Court: The Court will take judicial notice that there is a railroad known as the Pennsylvania Railroad.

[fol. 125] Mr. White: And that the distance from Louisville to New York is a certain distance.

The Court: Have you got the timetable on the table?

Mr. White: I have got the timetable, as far as from here to Louisville; that is sufficient.

The Court: What about the timetable when you sent these eggs?

Mr. White: Of course this timetable shows the schedule of trains to be 24, 25 and 26 hours. I have put it down 30, but the Court certainly will take judicial notice that the distance between Louisville and New York City is about as shown on this schedule.

The Court: Have you ever travelled from there?

Mr. White: I can testify to it myself.

Mr. Stockton: I call your attention to the fact that these are passenger trains, to begin with. That is through service. There is nothing to show that this express matter travelled on any particular passenger train; that it went through in the ordinary course of business.

Mr. White: Your Honor, we did not pay express to send these on a freight train, because we would not have employed the Adams Express Company. An express company is supposed to have fast service, and usually they run them on passenger trains or special trains following passenger trains. Your Honor, I will go on the stand myself and testify.

[fol. 126] Louis C. White, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination:

Q. Mr. White, have you ever been to Louisville, Ky.?

A. I have.

Q. What railroads have you travelled over?

A. Over the Pennsylvania from New York to Washington, and on the Chesapeake & Ohio from Washington to Louisville. Also I have travelled from New York to Louisville by way of the Pennsylvania going to Pittsburgh and Cincinnati and down to Louisville. I have also travelled from New York to Louisville by going by way of Indianapolis.

Q. Will you kindly state what time it usually took you to go from New York to Louisville on the Pennsylvania Railroad?

Mr. Stockton: I object to the question as irrelevant and immaterial.

The Court: Objection overruled.

Mr. Stockton: Exception.

A. About 25 or 26 hours.

Cross-examination.

By Mr. Stockton:

Q. Did you ever ride in any baggage car from Louisville to New York?

A. I never did. I have ridden in baggage cars, but not to Louisville.

Q. Were you ever shipped in an express car from New York to Louisville?

A. I am happy to say I was not, if it took as long to do as it did these eggs.

[fol. 127] Q. Were you ever handled as a shipment by an express company between New York and Louisville?

A. I never was.

By the Court:

Q. Were you ever regarded as freight?

A. I never was, your Honor.

By Mr. Stockton:

Q. I will tell you one thing, Mr. White: the thankfulness is mutual as far as the express company is concerned.

A. You are entitled to your opinion.

(Plaintiff rests.)

IN SUPREME COURT OF NEW YORK

MOTION TO DISMISS AND ARGUMENT THEREON

Mr. Stockton: That is all the evidence you want to put in?

Mr. White: That is all.

Mr. Stockton: Your Honor, I move to dismiss on the ground that it has not been shown in any way at all on what date this shipment arrived in New York City. I would like your Honor to rule on that first. I move to dismiss on the ground that there has been no delay shown by the Express Company, inasmuch as there has been no proof of the time that the eggs alleged to have been shipped by the Express Company were delivered in New York City.

Mr. White: Your Honor, we have testimony here that the eggs were delivered on March 4th by two or three witnesses, especially the man who made the entry when he got the telephone message [fol. 128] from the Express Company and that he sent a man up there to get them. That is in evidence here on this paper.

Mr. Stockton: That man did not testify when he made the entry. It only purports to be an entry of eggs received by Armour & Company. Assuming it is competent to show that Armour & Company received a certain amount of eggs——

The Court: Eggs were received by Brown.

Mr. Stockton: By Brown & Company; it may be competent to show that, although I do not believe it is properly authenticated, but it certainly is not competent to show when the eggs actually arrived in New York City. There is nothing to show at all from those records that would contradict the fact that the eggs may have been lying there at the station for five or six days. There is no evidence at all as to when the eggs first arrived in New York City.

Mr. White: Your Honor, it is up to them to prove that they notified us, if they came before the time that they did notify us.

The Court: I will deny your motion on that ground.

Mr. Stockton: Exception. And I also renew my motion to strike out the parts of the original deposition, the answers to Questions 85, 105 and 106 in the deposition of G. E. Jonte, as purely hearsay, and your Honor said at that time that you would take it subject to a [fol. 129] motion to strike out.

The Court: What is the other?

Mr. Stockton: 105 and 106. Those are the only questions that in any way really do tend to show any delay on the part of the Express Company, and they are entirely based upon hearsay.

The Court: I will give you the benefit of an exception, and I will deny your motion.

Mr. Stockton: Exception. I also move to dismiss the complaint on the ground that it is not proved that the Express Company received the goods, and I renew my motion to strike out the alleged express receipt that was offered in evidence, upon the ground that the only testimony to show that the receipte was executed by the company is the deposition of G. E. Jonte.

The Court: You mean, with regard to the words mentioned in it?

Mr. Stockton: Where he attempts to identify that letter, which he says is the agent's signature.

The Court: I will deny your motion.

Mr. Stockton: Exception. I also move to dismiss on the ground that the plaintiff has not shown the filing of a claim within four months from the time of delivery as required by Section 7 of the express receipt.

The Court: Will you complete your motion in that regard? What else, if you have anything on that score?

[fol. 130] Mr. Stockton: The most that he has shown, Section 7 of the express receipt requires——

Mr. White: What is the date of that express receipt?

Mr. Stockton: These are the tariffs and classifications which were in effect—they were filed August 17, 1917 and were in effect up to July 1, 1918. Section 7 provides: Except where the loss, damage or injury complained of was due to delay, or damaged while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within four months after the delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed.

The Court: From which you argue what?

Mr. Stockton: From which I argue that in this case he has not shown filing of any claim within four months at all, and that it is a condition precedent to recovery.

The Court: What do you say as to that?

Mr. White: I say, your Honor, whether this express receipt so states or not, if it does so state, it is illegal, because the Interstate Commerce law specifically provides, and I have it here, by the amendment of 1915, known as the Cummins Amendment 38 U. S. [fol. 131] Statutes 1196, it is provided among other things: See third and fourth provisos of the eleventh paragraph; "provided further that it shall be unlawful for any such common carrier to provide, by rule, contract, regulation or otherwise a shorter period of giving notice of claims of 90 days, for the filing of claims within four months, and for the institution of suits within two years, provided however that if the said damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The Court: What he argues from that, if I understand the argument, is that that provides for acts of negligence on the part of the party carrying the goods or merchandise, and in this case you are suing on the contract that was made between you and the Express Company.

Mr. White: Your Honor, my contention is that a provision requiring a notice to be filed, if reasonable, is perfectly legal unless it is an unlawful provision. Under the Interstate Commerce Act as amended any such provision is unconstitutional, is unlawful, because here in a very late case in 243 United States, the Court said, speaking of such a provision; "we may note that this case arose before the passage of the act of March 4, 1915, 38 Statutes 1196 regulating, among other things, this feature of the bill of lading issued under the [fol. 132] amendment." The Cummins Act has not been passed upon by the Supreme Court of the United States, but it has been passed upon by other courts, and in 208 Illinois it specifically says that any such provision was unlawful, and here in another recent case later than that one, in 249 U. S., the shipment had been made way back in 1914, and the claim was delay, and there was a provision in there saying that unless claim was filed within a certain time, the shipper would have no claim. The Court held that that provision in that particular receipt was all *right*; it was reasonable.

Mr. Stockton: Do you remember what the provision was?

Mr. White: It was less than four months, probably, but Justice Clark in his opinion said, speaking of these provisions for delay: "Certainly it should not be made a proviso of the law and extended beyond its strict terms in presence of the Act of Congress approved March 3, 1915 Chapter 176, 38 Statutes 1196, declaring that where in such suit the damage or injury complained of was due to delay, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. While the case at issue arose prior to the passage of this Act, it is an important declaration of public policy by Congress which should not be overlooked."

[fol. 133] Mr. Stockton: Excuse me just a minute. Did you read that whole excerpt there from the opinion?

Mr. White: This is the Supreme Court of the United States.

The Court: Mr. Stockton, what do you say with regard to that citation?

Mr. Stockton: In the first place, the citation squarely upholds our position, because, as it says, in a case where the notice was shorter than four months, showing it was upheld. He goes ahead and cites some general language by which he is trying to prove that a period of four months longer than the period in the B. & O. case is an unreasonable period. However, that case is squarely before us. The only authorities that I have been able to find that support the four months' clause are the Appellate Division and the Supreme Court of the United States and Circuit Court of Appeals in almost every Circuit of the United States. There is not a court in the United States now that disregards the four months' clause. They tried to break the four months' clause under the Transportation Act of 1920 by saying that the thing could be waived. There was a case in New York in the Court of Appeals, I think it was the Pease Piano case or some such case, that held that it could be waived apparently, but subsequently decisions of the Appellate Division have held that that was a peculiar case, because there the Interstate Commerce Commission gave the particular permission to waive, and the United States [fol. 134] Supreme Court has now held that the four months' clause not only has got to be enforced, but the carrier could not fail to enforce it if it wanted to because that would constitute a discrimination. In other words, that once a claim has gone beyond the four months' period without having been filed in accordance with the regulation of the receipt, the carrier could not, if it wanted to make a present to the man, do so without being guilty of a discrimination. He has got to take advantage of it.

Mr. White: Your Honor, I have investigated every possible case in the Supreme Court of the United States. There has been no case that I can find that bears out my friend's contention. On the contrary, these cases were for shipments made prior to the amendment of the Interstate Commerce Law, and the courts certainly held that where such a provision was in a contract, that it was if reasonable lawful; but since the passage of this amendment, and the Cummins Amendment was passed specifically to say that where the damage was due to delay or to carelessness or negligence in the transportation, then no notice of claim need be filed.

The Court: There is certainly a radical difference between you.

Mr. Stockton: There is certainly a difference of law between us, your Honor; there is no question about that.

Mr. White: In 208 Appellate Division of Illinois they specifically said—of course that was prior to these decisions that I am read- [fol. 135] ing from the Supreme Court of the United States; they say there that no claim is necessary to be filed where the damage is due to delay or due to carelessness or negligence in transportation. That was in 1915. The other decisions hold, and this 243 United

States held, that such a provision if reasonable was really a limitation, a statute of limitations.

The Court: Mr. Stockton, I will reserve my decision on your motion to dismiss on that ground. Your contention is, as I understand it, that there was no claim presented within the four months.

Mr. Stockton: That is it, exactly.

The Court: And that these letters that were written or communications sent or tracers that were sent out did not constitute a claim under the law.

Mr. Stockton: Exactly. That case which I cited in my memorandum in 184 Northwest Minnesota is perhaps the most recent case in that, and it is absolutely and squarely in point. There is also a case in the New York Supplement which I cite.

Mr. White: Your Honor, 208 Illinois Appellate Division is squarely in point also, but I wish to read this provision, and I do not quite get my friend's contention: "Except where the loss, damage or injury complained of is due to delay." That is what we are claiming here.

Mr. Stockton: Read the rest.

Mr. White: I am going to read it.

The Court: That has to be read in connection with the other.

[fol. 136] Mr. White: Surely it does.

The Court: Delay or injury.

Mr. White: I will read it your Honor: "Except where the loss, damage or injury complained of is due to delay, or damaged while being loaded or unloaded or delayed in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing." "If it is due to delay"—and the opinion that I am reading here from the Supreme Court of the United States has it just exactly the way that I am reading it to you.

The Court: But the delay that you are suing on is the delay inherent in the acceptance of the goods. That is inherent in the contract made with you, isn't it? That is, if I understand you correctly, you argue that they were bound to transmit that shipment.

Mr. White: In a reasonable time.

The Court: Within a reasonable time, which you claim was not more than 30 hours.

Mr. White: Yes, your Honor.

The Court: So that it was for failure to do what was inherent in the receipt given, in the implied contract, or in the contract that you sue for damages.

Mr. White: Yes, your Honor, if this express receipt had specifically set forth that no claim for damage shall be good unless a claim is made in four months, I would say that that would not be good, because it would violate the United States Statutes; but as [fol. 137] a matter of fact it does not say so. It says "Except where the claim for damage is due to delay," then you must make your claim within four months.

The Court: I will reserve my decision on that point.

Mr. Stockton: I have just one or two papers I would like to put in. I think I will put Mr. Kenny on the stand.

FRED T. KENNY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Stockton:

Q. Mr. Kenny, what is your occupation?
A. At the present time?
Q. Yes.
A. Purchasing agent Adams Express Company.
Q. How long have you been in the employ of the Adams Express Company?
A. Over 16 years.
Q. Were you ever in the Claim Department of the Express Company?
A. I was.
Q. For how many years?
A. 13 years.
Q. Will you state whether there is any difference in the way in which formal claims and tracers are handled by the Express Company?

Mr. White: I object to this, your Honor, on the ground that there is nothing in their answer relating to this matter. There is no affirmative defense pleaded here except the value, and, secondly, they say that the claim was not filed within two years.
[fol. 138] Mr. Stockton: Four months.
The Court: There are two separate defenses set up in their answer. The first, as I recall it, is that there was no claim made within the time.
Mr. White: Then within two years; nothing in that four months' proposition. There is a claim there that the suit was not commenced within two years.
The Court: Yes; the first defense is with regard to the representations as to the value made at the time of shipment. The second defense is, that the action was not brought within the two years required.
Mr. Stockton: This is in rebuttal to his claim. It is in support of my contention that letters which he has filed were not claims, your Honor. That is the ground on which I seek to introduce it, to show there is an actual and substantial difference between a claim and a tracer.
The Court: Your position being that no claim was filed with the company.
Mr. Stockton: That is it, exactly, such as a condition precedent to liability.
The Court: I will allow it.
Mr. White: I take an exception.

Q. Is there any difference, Mr. Kenny, in the way in which claims are handled as distinguished from tracers?

A. There is a marked difference.

Q. What do you mean when you speak of a claim?

A. A claim is where the shipment is fully described as called for by the Interstate Commerce regulations; that is, the shipper or the claimer must describe the shipment with reasonable definiteness [fol. 139] as to its value etc. The company then sets the claim up as a charge against it for the loss of the specific shipment, and it is recorded accordingly.

Q. What do you mean by tracer?

A. A tracer is merely a request to trace a shipment that has possibly been reported not received, or where the shipper has not heard from the consignee, and asks the carrier to trace before they bill the consignee. We have found that to be the case in a large majority of instances.

Q. Is there any difference in form, any universal difference in form between a tracer and a claim?

A. Why, the tracers are not handled by the same people or departments as claims.

Q. When a consignee or a shipper goes to an Express Company and files a request to trace the shipment and to tell him whether or not it has been delivered, by what department is that tracer handled?

A. In some cities they have what they call a correspondence bureau; that is where all tracers are handled. In New York they had two bureaus at one time. We had a Claim Bureau and a Correspondence Bureau.

Q. How about Louisville?

A. Louisville handled tracers. If it was a claim, it was sent to Chicago, which was the Claim Department for that district.

Q. What in the ordinary course of business does the agent of the Express Company do when a tracer is handed to him?

A. Attaches a copy of the way bill on which the shipment left his office, and passes the tracer to the agent at destination for a report as to the receiving of the shipment.

Q. What does he do when a formal claim is handed to him?

A. Passes that to the Claim Department, and he has no further [fol. 140] trouble with it. He has nothing else to do with it.

Q. Does the agent, after he has passed a tracer on, as you have just described, have anything further to do with it?

A. Why, it is his duty in a measure, to see that a reply is received and an answer given the shipper as to the result of the tracer.

Mr. White: Your Honor, I first of all move to strike out all of this testimony on the ground it is irrelevant, incompetent and immaterial.

The Court: I will deny your motion.

Mr. White: Exception.

Cross-examination.

By Mr. White:

Q. You say you are purchasing agent?
A. Yes, sir.
Q. How long?
A. Two months.
Q. What were you doing prior to that?
A. Handling claims.
Q. Where?
A. New York.
Q. Did you have anything to do with claims filed in Louisville?
A. Claims filed in New York pertaining to Louisville shipments.
Q. You investigated this claim, didn't you?
A. Not this particular claim.
Q. You saw the papers in it?
A. I have, at one time.
Q. You knew that there was a claim made that these eggs had not arrived in New York until March 4, 1918, didn't you?
A. Some months ago I did, yes.
Q. And it was verified by your company, wasn't it?
A. In what respect.
[fol. 141] Q. That the eggs did get here at that time?
A. On what date?
Q. March 4, 1919?
A. We investigated that?
Q. Didn't you investigate the whole claim and simply turn it down, not on the ground that there was not any delay, but because we did not file a claim within four months?
A. Not I personally.
Q. Not you personally, but you know that to be a fact?
A. I suppose so, if the papers indicate that.

The Court: You asked him several questions. Did you find that the eggs arrived here on March 4th?

The Witness: I don't know that I—I have not looked at that feature of the case. I would have to examine the files to tell you that. Personally, I didn't make that kind of investigation.

Q. Did you have anything to do with preparing this answer, swearing that you have not any knowledge or information about any of these shipments?
A. Absolutely not.

Redirect examination.

By Mr. Stockton:

Q. Will you look through this file, that is the claim file, and see if you can find in it any papers which absolutely convince you as an operating agent of the Adam Express Company that shipment arrived on March 4, 1918?

Mr. White: I object to that as irrelevant, incompetent and immaterial.

[fol. 142] The Court: I will sustain the objection.

A. I said if I looked at the file I might——

The Court: I sustain the objection.

Mr. Stockton: I offer in evidence a paper purporting to be a claim filed by Armour & Company for the loss of a shipment of eggs made from the Kentucky Creameries Louisville, Ky., consigned to H. L. Brown & Company shipped February 23, 1918.

No objection. Received and marked Defendant's Exhibit 1.

(Defendant rests.)

IN SUPREME COURT OF NEW YORK

MOTION AND ORDER FOR DIRECTED VERDICT.

Mr. White: I move, your Honor, for a directed verdict on the ground that there is no testimony here to show that these eggs were not shipped exactly as we have proven, and that they should have arrived here on February 25th and did not arrive here until March 4th.

The Court: What do you say as to that? What evidence is there rere outside of the legal question now?

Mr. Stockton: I say, your Honor, there is no evidence at all that the shipment, in the first place, was ever delivered to the Express Company; in the second place, that it was not delivered until March 4, 1918.

The Court: I will direct a verdict.

By direction of the Court the jury find a verdict in favor of the [fol. 143] plaintiff for the sum of $3,396.26.

Mr. Stockton: Will you note an exception to that.

The Court: Now you can make your motion.

Mr. Stockton: I make a motion for a new trial on the grounds specified in Section 999 of the Code of Civil Procedure and also under the grounds specified in Section 549 of the New Practice Act except that the verdict is excessive.

The Court: On that I reserve my decision, and I will take briefs from both of you.

Briefs to be submitted June 1, 1922.

IN SUPREME COURT OF NEW YORK

STATEMENT THAT CASE CONTAINS ALL THE EVIDENCE

This case contains all the evidence had and adduced upon the trial of this action, as well as the exceptions of both sides.

[fol. 144] PLAINTIFF'S EXHIBIT A.

Receiving Form 37
July 1917

In lieu of signing each page of this book shipper has signed the agreement on the inside front cover.

Non-negotiable Receipt

This receipt must not be removed from book.

Adams Express Company, at Louisville, Ky.

Received from Ky. Creameries the shipment hereinafter listed, subject to the Classification and Tariffs in effect on the date hereof, which shipments the Company agrees to carry upon the terms and conditions of the Uniform Express Receipt in effect on date of shipment.

Feb. 23—1 Car Eggs—522 Case.
(Car No. Ad. Ex. Co. 6083.)
Value—$8,143.00
Consignee—H. L. Brown & Co.
Destination—Greenwich St., New York City, N. Y.
Received for the Company—Mattmillee.

(Over)

Apr. 3—15 Boxes Plty.—686
Consignee—Armour & Co.
Destination—Atlanta, Ga.
Apr. 10—15 Box—Poultry.
Consignee—Armour & Co.
Destination—Lexington, Ky.
Received for the Company—Mattmillee.
Stamp—Subject to delay account congestion.

[fol. 145] PLAINTIFF'S EXHIBIT B

Harold L. Brown Co., Inc.
Butter, Cheese, Eggs, & Poultry
325-327 Greenwich Street

United States Food Administration License No. G-08855

Kentucky Creameries,
Louisville, Ky.

New York, N. Y., 4/19, 1918.

DEAR SIR:

We enclose herewith our Check No. 5481 for $4877.56 to cover shipments received 3/4, 1918, as follows.

No.	Description	Weights or Dozens	Price	Amount	Total
285	Tubs Eggs	8550	35½	3035.25	
237	Cases Eggs	7110	34	2417.40	
		15660		5452.65	
522	Boxes Poultry Less Freight and Cartage			575.09	
					4877.56

Lot No. 1632, Car No. —

Less	Com.	$
"	Frt. or Exp.	522.89
"	Draft	52.20
"	Cartage	
	E. & O. E. F. O. B. Delivered	$575.09

[fol. 146] PLAINTIFF'S EXHIBIT C

American Express Company

410 Jefferson St., Louisville, Ky.

C. W. Latimer, General Agent

When sending money by mail, use American Express Co. Money Orders. (1062)

(Fac-simile of American Express Money Order.)

Consult American Express Travel Department for independent or personally conducted tours.

Kentucky Creameries, City. Louisville, Ky., March 23, 1918.

GENTLEMEN:

I have your letter of March 11th in regard to shipments of eggs on February 22nd, 23rd and 24th.

I am investigating the handling of these shipments and hope to be able to give you the information you are seeking shortly.

Yours truly, C. W. Latimer, General Agent. CWL/KMW.

[fol. 147] PLAINTIFF'S EXHIBIT D

(Letterhead of Adams Express Company)

Fred L. Grinstead, General Agent

Louisville, Ky., May 16, 1918.

Shipments of eggs from Kentucky Creameries Louisville, Ky., to H. L. Brown, Co., New York City, Feb. 19th & 23rd.

Kentucky Creameries,
Floyd and N Streets.
Louisville, Ky.

GENTLEMEN:

In answer to your letter of May 7th, regarding shipment of 500 cases of eggs will say the Penna. Baggage Car #5976 went out on Feb. 19th, left on Penna Train #307 at 10:45 P. M.

Baggage Car #6083 out on Penna #307, Feb. 23d.

We have no information as to any transfer being made of these cars. The same should have gone direct by Indianapolis to Pittsburgh without transfer.

Yours truly, F. L. Grinstead, General Agent. mcw/he.

[fol. 148] PLAINTIFF'S EXHIBIT E

Armour.

Egg Report of Receipts

Harold L. Brown Co., Inc. Lot Report No. 1632

Advice No. ..... Stencil No ..... Date Received 3/4/18

Received at ..... Date Shipped 2/23/18

Purchased From Kentucky Creameries Town Louisville

Car No. Ad x 6083 Carted by Gillen State Ky.

Shipped From

Purchase Record

No Cases	Grade	Dozen	Cost Price	Amount
522	285 Br	8550	35½	3,035.25
	237 Do	7110	34	2,417.40
	522	15660		5,452.65
522		15660	6	5,452.65

Goods O. K.

Price O. K.

Basis Buy

F. O. B. Deliver

Discount Net

F. and E. O. K. John

O. K. to Pay F

Business of 5

" "

" "

Check No.	Amount
5481	4,877.56
No.	Amount
Plant Invoice	
B. H. Trans.	
Draft	
Freight or Express	522.89
Cartage	52.20
Total	5,452.65
Period	5,452.65

CANDLING RECORD

No. 1

Repacked Selects Helmets Rurals Candled Cks. Lkers Loss

Book 21 Short 6 Doz

[fol. 149]

R. R. or express Co.	Frt. bill No.	Date	Gr. wt.	Rate	Charges	Entries effecting results			Amount
			27,666		497.99		#1	(5)	8.52
				20	24.90				5,580.75
					522.89				5,589.27

Sales

Date	Book	Grade	Doz.	Price	Amount	Total
3/7/19						
¾	20251	.....	1,500	36½	547.50	
¾	20255	.....	1,800	"	657.00	
¾	20144	.....	750	35	262.50	
¾	20142	.....	450	"	157.50	
¾	8574	.....	600	"	210.00	
¾	20143	.....	150	"	52.50	
¾	20139	.....	750	"	262.50	
¾	20138	.....	750	36½	273.75	
¾	20150	.....	600	35	210.00	
¾	20149	.....	3,000	"	1,050.00	
¾	20219	.....	3,000	36½	1,095.00	
¾	20228	.....	150	35	52.50	
¾	20148	.....	150	"	52.50	
¾	20256	.....	750	"	262.50	
¾	20257	.....	750	"	262.50	5,408.25
¾	1599	20258	24	35½	Entry #1.	

[fol. 150] PLAINTIFF'S EXHIBIT F

Assignment

For value received, the undersigned Armour & Company, a Kentucky corporation, does hereby sell, assign, transfer, and deliver unto A. H. Van Pelt of New York City, his executors, administrators, and assigns, any and all sums of money due or owing to it, and all claims, demands, and causes of action of any kind whatsoever which it has had, now has, or may have, against the Adams Express Company by reason of and arising out of the shipment of a carload of eggs from Louisville, Kentucky, on or about February 23, 1918, in car No. 6083, consigned to The Harold L. Brown Company of New York City.

In witness whereof, the said Armour & Company has caused its corporate name to be hereunto subscribed and its corporate seal to be attached this 16th day of February A. D. 1920.

Armour & Company, By F. Edson White, President. Attest: George M. Willetts, Secretary. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

I, W. W. Shaw, Notary Public, do hereby certify that Mr. F. Edson White, President and Mr. G. M. Willetts, Secretary of the [fol. 151] above named Armour & Company, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as such President and Secretary and to be such President and Secretary, appeared before me this day in person and acknowledged that they as such signed, sealed and delivered said instrument as the free and voluntary act of said corporation, and as their own free and voluntary acts as such President and Secretary thereunto duly authorized for the uses and purposes therein set forth.

Given under my hand and seal this 16th day of February, A. D. 1920.

W. W. Shaw, Notary Public. (Seal.) My Commission expires June 11, 1925.

15660
53
46980
8300
2
82980

18

[fol. 152] DEFENDANT'S EXHIBIT 1

Armour and Company

General Offices: Union Stock Yards

Chicago, Ill.

Chicago, Ill., 10/4/18

Adams Express Company to Armour and Company, Dr.

Transportation Department

Vouchers will be receipted only by our Cashier, to whom all payments must be made. PWI.

Claim No. 73906.

In remitting, please do not fail to show our Claim Number on Voucher.

Enclosures: Copy ads. exp. rcpt., 2/23/18.

Claim as follows:

Consignor: Kentucky Creameries, Louisville, Ky.

Consignee: H. L. Brown & Co., Greenwich St.

Date Shipped: 2/23. Car No. —. New York, N. Y.

Exceptions: Ads. 6083.

This carload of eggs, (522 cases) should have arrived at New York on Feb. 25th. It did not reach there, however, until March 4th. The market price on eggs at New York on Feb. 25th was 65c. We claim as follows to cover loss sustained due to delay.

[fol. 153] Tariff Authority:

522 cases eggs, 15,660 doz., .65			10,179.00
Less sales:			
8,550 doz., .35½		3,035.25	
7,110 doz., .34		2,417.40	
			5,452.65
Loss			$4,726.35

Certified Correct: F. J. Louthan.

(Stamp:) American Railway Express Co. Oct. 17, 1918. Claim Bureau, Chicago, Ill.

SUPREME COURT, TRIAL TERM, PART IX

OPINION

BURR, Justice:

Van Pelt v. Barrett, as pres., &c.—Motion made by the defendant to set aside the verdict and for a new trial upon the ground that plain-

tiff had failed to file a claim within the specified time set forth in the express receipt is denied. A provision in a receipt given by an express company to the effect that the company will not be liable for any loss unless a claim is made therefor in writing within a specified number of days from the accruing of the cause of action is not a condition precedent to the right of recovery by the owner of the goods, but is in the nature of a Statute of Limitation and cannot be availed of upon the trial where it is not set up in the answer. (Westcott v. Fargo, 61 N. Y., 542; Hoye v. Penn. R. R., 191 N. Y., 101.)

[fol. 154] IN SUPREME COURT OF NEW YORK

STIPULATION SETTLING CASE

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing case contains all the evidence taken upon the trial and all exceptions of all parties and that an order may be entered herein settling the same as such and ordering the same on file without further notice.

Dated, New York, September —, 1922.

Stockton & Stockton, Attorneys for Defendant-Appellant.
Lamar Hardy, Attorney for Plaintiff-Respondent.

IN SUPREME COURT OF NEW YORK

ORDER SETTLING CASE

On the foregoing stipulation the above case on appeal which contains all the evidence and exceptions of all parties is hereby settled and ordered on file.

Dated, New York, September —, 1922.

William P. Burr, J. S. C.

[fol. 155] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing are true copies of the judgment roll, the notice of appeal, the case and exceptions as settled and the whole thereof now on file in the office of the Clerk of the County of New York, and that certification thereof is hereby waived and that an order directing the filing of the record in the Appellate Court may be entered without further notice.

Dated, New York, September —, 1922.

Stockton & Stockton, Attorneys for Defendant-Appellant.
Lamar Hardy, Attorney for Plaintiff-Respondent.

IN SUPREME COURT OF NEW YORK

ORDER FILING RECORD IN APPELLATE DIVISION

Pursuant to the foregoing stipulation, it is ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department.

Dated, New York, September —, 1922.

William P. Burr, J. S. C.

[fol. 156] SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT FEBRUARY, 1923

OPINION OF APPELLATE DIVISION

John Proctor Clarke, P. J.; Alfred R. Page, Edgar S. K. Merrell, Edward R. Finch, John V. McAvoy, JJ.

No. 8939

[Title omitted]

Appeal from a Judgment of the Supreme Court, New York County, Entered upon a Directed Verdict, and from Order Denying Defendant's Motion for a New Trial

Kenneth E. Stockton, of Counsel (Stockton & Stockton, attorneys) for Appellant.

Louis C. White, of Counsel (Lamar Hardy, attorney) for Respondent.

PAGE, J.:

The action was to recover damages occasioned by the delay in transportation of a carload of eggs from Louisville, Kentucky to New York City. The eggs were delivered to the defendant at Louisville, February 23, 1918, and were not received and delivered to the consignee in the City of New York until March 4, 1918. [fol. 157] The plaintiff established a sufficient prima facie case.

The sole defense relied upon by the defendant, and upon which evidence was offered, was that no claim was filed with the defendant within four months after the delivery of the property to the consignee, as required by the express receipt.

G. T. C.

Provisions in shipping contracts, limiting the time within which actions must be commenced and providing that carriers should not be liable for damages unless a claim was presented within a specified time, have been repeatedly upheld by the United States Supreme Court. Some of these cases are cited by the appellant. In all such cases the shipments were made prior to the

enactment of the Cummins Amendment to the Interstate Commerce Act of 1915, which, among other things,

"Provided, further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation or
G. T. C. otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years; Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

This Court has directly passed upon a similar contention to that advanced by appellant, where the shipment was made after the [fol. 158] adoption of the Cummins Amendment. We said:

"It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to-wit: (1) those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and those for loss otherwise sustained, which we will call non-transit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a non-transit claim within four months, and in such case to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of a claim as a condition precedent to recovery but authorized a requirement that suit be instituted within two years." (Bell v. N. Y. C. R. R. Co., 187 App. Div. 564, 566).

The requirement in the express receipt for a notice of claim to be filed, being prohibited by law, has no force nor effect. The alleged defense was therefore insufficient.

The appellant also presents as reversible error the denial by the Court upon the trial to suppress a deposition of a witness, which had been taken in Louisville. The deposition was taken pursuant to a notice of eight days served on the defendant's attorneys. There was some negotiation by the defendant's attorneys to secure an adjournment. The attorneys for the respective parties entirely disagree in their statements as to what occurred. This much, however, [fol. 159] is clear, that three days before the time of the taking of the deposition the defendant's attorney asked the plaintiff's attorney to consent to an adjournment to May sixth. The plaintiff's attorney replied that he was afraid that the application was too late, as the witness was to come from Springfield, Missouri, and the attorney to conduct the examination was to go from Chicago, but he would try and arrange the matter by telegraph. He thereupon telegraphed his correspondent in Chicago, and received word that the witness had already started for Louisville. The defendant's attorneys were so informed and that it would be impossible to adjourn the taking of the testimony. Instead of one of defendant's attorneys at-

tending at Louisville, they wrote to an attorney in Louisville requesting him to appear before the commissioner and apply for an adjournment. Such application was made and denied. The deposition of the witness was taken without cross examination by the defendant, and was returned more than ten days before the trial. The defendant then moved that the witness be directed to return to Louisville for cross examination. The learned Justice at Special Term denied the motion and stated that the proper practice was to move to suppress the deposition, under Rule 133 of the Rules of Civil Practice. Instead of making this motion at Special Term upon affidavits setting forth the facts, the defendant's attorneys served a notice that they would so move at the trial. At the opening of the trial the Court heard the statements of the counsel, and discovered that there was a decided conflict in their statements, and ruled that the motion should have been made at Special Term on affidavits setting forth the facts, which then could have been met by opposing affidavits. The only way that he could
G. T. C. [fol. 160] dispose of the matter at that time was to adjourn the trial to enable the parties to produce witnesses and take their examination, which would be imposing upon the Trial Court the duty of trying a collateral issue.

In my opinion, while the rule is silent as to the place where the motion should be made, the rule laid down in Newton v. Porter (69 N. Y. 133), should apply, i. e., where the party had knowledge of the facts upon which he sought to suppress the deposition for a sufficient time to enable him to have made the motion at Special Term, the motion should have been there made; and if not so, made, it would be deemed to have been waived, and could not be made upon the trial. As pointed out by the Court in that opinion, if the objection was raised by motion at Special Term and the motion granted, the party taking the deposition would have an opportunity to take a new deposition, whereas, if the motion was made upon the trial, he was deprived of that privilege. In my opinion, however, the motion was properly denied, because it was not shown that the attorneys had practiced any fraud or unfair or overreaching conduct in respect to the taking of the deposition. One of the attorneys for the defendant had to be in Louisville on the 6th day of May to attend to some other matter, and desired, for his convenience, that the matter should be adjourned until that date. When he was notified that the matter would not be adjourned, he did not apply to the Court for a modification of the notice, changing the date of the hearing, nor did he attend upon the taking of the deposition.

The judgment and order should be affirmed with costs.

Clerk's Certificate to above opinion omitted in printing.

[fol. 161] SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

J. T. K.

[Title omitted]

NOTICE OF ARGUMENT—Filed Nov. 22, 1922

Please take notice, That the appeal in the above action will be brought on for argument before the justices of the Honorable Court at a stated term thereof, to be held at the Court-House of the said Court, at 25th Street & Madison Avenue in the Borough of Manhattan, City of New York on the 4th day of December at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Dated November 21st 1922.

Yours, &c., Stockton & Stockton, Attorneys for Def.-App., 2 Rector Street, New York City. To Lamar Hardy, Attorney for Plf.-Respt., 149 Broadway, New York City. (Seal of the State of New York.)

[fol. 162] [Endorsed:] Supreme Court of the State of New York, Appellate Division—First Dept. Arthur A. Van Pelt, Plf.-Respondent, against William M. Barrett, as President of the Adams Express Co., Def.-Appellant. Notice of Argument. Stockton & Stockton Attorneys for def.-app. Lamar Hardy, Attorney for plf.-app. Due service of a copy of the within notice is hereby admitted. Dated Nov. 21, 1922. Lamar Hardy, Attorney for Pltf. App.

[fol. 163] AT A TERM OF THE APPELLATE DIVISION OF THE SUPREME COURT HELD IN AND FOR THE FIRST JUDICIAL DEPARTMENT, IN THE COUNTY OF NEW YORK, ON THE 4TH DAY OF MAY, 1923

Present: Hon. John Proctor Clarke, Presiding Justice; Alfred R. Page, Edgar S. K. Merrell, Edward R. Finch, John V. McAvoy, Justices.

[Title omitted]

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT AND ORDER

An appeal having been taken to this Court by the defendant from the judgment of the Supreme Court of New York County entered on the 17th day of July, 1922, and from an order made by said Court denying a motion for a new trial, entered on the 29th day of June, 1922 and said appeal having been argued by Mr. Kenneth E. Stockton, of counsel for the appellant, and by Mr. Louis C. White, of counsel for the respondent; and due deliberation having been had thereon, it is hereby unanimously ordered and adjudged that the

judgment and order so appealed from be and the same are hereby, in all things, affirmed; and that the respondent recover of the appellant the costs of this appeal.

[fol. 164] APPELLATE DIVISION OF THE SUPREME COURT, FIRST JUDICIAL DEPARTMENT

Clerk's Office, County of New York

I, George T. Campbell, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the Appeal in the above entitled action or proceeding, and entered in my office on the 4 day of May 1923, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 8 day of May 1923.

George T. Campbell, Clerk. (Seal.)

[Endorsed:] Appellate Division of the Supreme Court, First Judicial Department. Van Pelt v. Barrett. Order of Affirmance on Appeal from Judgment and Order. Filed, May 4, 1923.

[fol. 165] STATE OF NEW YORK,
County of New York:

CLERK'S CERTIFICATE

I, James A. Donegan, Clerk of the Supreme Court in and for said County, and Clerk of the Supreme Court of said State, do hereby certify that the foregoing consists of certified copies of the Notice of Appeal, the order appealed from, and the papers on which the Court below acted in making said order.

In witness whereof, I have hereunto set my hand and affixed my Official Seal this 24 day of August 1923.

James A. Donegan, Clerk. (Seal of the State of New York.)

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United States Supreme Court.

In the Matter

—of—

The Petition of WILLIAM M. BARRETT as President of the Adams Express Company,

Petitioner,

—against—

ARTHUR H. VAN PELT,

Respondent,

for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Department, to bring before the Supreme Court the case of ARTHUR H. VAN PELT,

Plaintiff-Respondent,

—against—

WILLIAM M. BARRETT, as President of the Adams Express Company,

Defendant-Appellant.

Sir:

PLEASE TAKE NOTICE that upon a certified copy of the transcript of record herein, and upon the annexed petition of William M. Barrett, verified the 23rd day of August, 1923, I shall submit the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia,

on the 15th day of October, 1923, at the opening of court on that day, or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated, New York, August 22rd, 1923.

Yours, &c.,

CHARLES W. STOCKTON,
Attorney for Petitioner,
Office & P. O. Address,
2 Rector Street,
Borough of Manhattan,
City of New York.

To:

LAMAR HARDY, ESQ.,
Attorney for Respondent.

UNITED STATES SUPREME COURT.

In the Matter

—of—

The Petition of WILLIAM M. BARRETT as President of the Adams Express Company,

Petitioner,

—against—

ARTHUR H. VAN PELT,

Respondent,

for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Department, to bring before the Supreme Court the case of ARTHUR H. VAN PELT,

Plaintiff-Respondent,

—against—

WILLIAM M. BARRETT, as President of the Adams Express Company,

Defendant-Appellant.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows as follows:

I. Your petitioner is the President of the Adams Express Company, a joint stock associa-

tion, organized under the common law of the State of New York, which, prior to July 1, 1919, did a general express business in the United States.

II. This action was brought to recover damages for alleged delay in the transportation of a carload shipment of eggs delivered to the Adams Express Company at Louisville, Kentucky, by the Kentucky Creameries Company on February 23, 1918, consigned to the plaintiff's assignor, Harold L. Brown & Company, Greenwich Street, New York City.

It is alleged that the shipment did not arrive at destination until March 4, 1918, which was alleged to be several days beyond a reasonable time for delivery. The plaintiff's claim for damages is based solely upon the difference between the market value of the eggs on February 25, 1918, when it is claimed they should have arrived at destination, and March 4, 1918, the date when it is claimed that they first arrived.

The complaint does not specifically allege any negligence on the part of the defendant, nor does the proof attempt to show anything except the mere fact of delay in transportation beyond the alleged reasonable time for delivery.

III. It is undisputed that the first claim made by the plaintiff's assignor on the Adams Express Company was contained in a formal notice of claim dated October 4, 1918 (Defendant's Exhibit 1).

IV. The said shipment of February 23, 1918, was transported pursuant to the terms of a receipt

issued by the Adams Express Company which provided in part as follows:

> "Received from Kentucky Creameries the shipments hereinafter listed, subject to the Classification and Tariffs in effect on the date hereof, which shipments the Company agrees to carry upon the terms and conditions of the Uniform Express Receipt in effect on the date of shipment" (Plaintiff's Exhibit A).

Section 7 of the Uniform Express Receipt contained in the Classification and Tariffs filed with the Interstate Commerce Commission and in effect on February 23, 1918, provided as follows:

> "Except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

This provision of the Uniform Express Receipt was inserted therein pursuant to the authoriza-

tion contained in the Act of March 4, 1915, Chapter 176, otherwise known as the First Cummins Amendment to the Interstate Commerce Act.

The relevant part of said Act reads as follows:

> "Provided, further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise, a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, That if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

V. At the close of the plaintiff's case the defendant moved to dismiss the complaint on the ground that the plaintiff had not proved the filing of a claim within four months after the date of delivery of the shipment in accordance with the provisions of paragraph 7th of the Uniform Express Receipt which made such filing of a claim a condition precedent to recovery by the plaintiff. The Court at that time reserved decision on this motion.

VI. The defendant then introduced evidence to show the distinction between a claim and a "tracer" and rested without introducing further

testimony. Thereupon the plaintiff's counsel moved for the direction of a verdict, which motion was granted by the Court. The defendant then moved for a new trial, on which motion decision was reserved by the Court. Thereafter the Court handed down a decision denying the motion to dismiss the complaint and the motion for a new trial, holding that by failure to affirmatively plead the requirements of Section 7 of the Uniform Express Receipt the defendant had lost the right to avail himself of that defense upon the trial. (Opinion of Trial Justice, Record, fol. 459.) Subsequently judgment was rendered against defendant in favor of the plaintiff for $3,345.65 in the Supreme Court for New York County on June 7, 1922.

VII. Thereafter the defendant appealed to the Appellate Division of the Supreme Court for the State of New York, for the First Department, from the said judgment in favor of the plaintiff, and from the order denying the defendant's motion for a new trial. Said appeal came on for argument and on May 4th, 1923, the Appellate Division affirmed said judgment in all respects. (Opinion of Appellate Division by Page, J.) In the opinion, handed down at the time said judgment was affirmed, said Appellate Division of the Supreme Court for the First Department specifically stated that the provisions of subdivision K of Section 20 of the Interstate Commerce Act (Act of March 4, 1915, Chapter 176), prohibited a common carrier engaged in interstate commerce from requiring the filing of a claim in writing as a condition precedent to recovery in the case of claims for delay in transportation.

VIII. The defendant made a motion in the said Appellate Division for a reargument of the appeal or for leave to go to the Court of Appeals of the State of New York, but this motion was denied without opinion on May 25, 1923.

IX. Thereafter the defendant made a motion in the Court of Appeals of the State of New York for leave to appeal to that Court from the judgment of the Appellate Division for the First Department, but said motion was denied without opinion on July 14th, 1923.

X. The principal questions and propositions of law involved in the case are as follows:

(a) Does Chapter 176, Act of Congress, March 4, 1915, otherwise known as the First Cummins Amendment to the Interstate Commerce Act, prohibit common carriers engaged in interstate commerce from requiring the filing of written claims for delay in transportation as a condition precedent to recovery?

(b) Could the defendant waive the right and duty to take advantage of the defense that the plaintiff had failed to file a claim in writing within the time specified in the Uniform Express Receipt, by failing to plead such defense affirmatively.

(c) If Chapter 176, Act of Congress of March 4, 1915, prohibits a common carrier from requiring the filing of claims in writing for delay *caused by the carelessness or negligence of the carrier,* is the burden of alleging and proving the carelessness or negligence to bring the case within this exception on the shipper or the carrier?

Your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons, among others:

(a) Because the questions involved in this case are of great public interest, as they directly affect the requirements for the validity of a great number of claims for loss and damage arising out of transportation of merchandise in interstate commerce.

(b) There has already been a conflict of judicial opinion as to the proper interpretation of the First Cummins Amendment to the Interstate Commerce Act.

(c) It is particularly desirable that the interpretation of the First Cummins Amendment to the Interstate Commerce Act should be uniform throughout the United States, and should be similarly applied by the courts of every state, as otherwise there is grave danger that in some states claimants will secure discriminatory advantages over litigants in other states which have differently interpreted Act.

(d) The decision of the United States Supreme Court will settle the interpretation of the First Cummins Amendment to the Interstate Commerce Act, and will establish a uniform rule of law throughout the entire United States as to the requirements for the validity of claims for damage due to delay in transportation of merchandise in interstate commerce.

(e) Because the decision of the court below is based upon any erroneous interpretation of the Federal law and will establish an erroneous rule within the state of New York.

WHEREFORE, your petitioner prays that this Court will be pleased to grant a writ of certiorari in this case to the Appellate Division of the Supreme Court of the State of New York for the First Department to bring up this case to this Honorable Court, and for such proceedings therein as to this Honorable Court may seem just.

WILLIAM M. BARRETT,
By CHARLES W. STOCKTON,
Attorney for Petitioner,
2 Rector Street,
New York.

State of New York,
County of New York,
Southern District of New York—ss.:

WILLIAM M. BARRETT, being duly sworn, says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to the best of his knowledge and belief; that his knowledge and belief are based upon the record in the case, his general knowledge of the affairs of the Adams Express Company, and statements made to him by counsel in the case.

WILLIAM M. BARRETT.

Sworn to before me this
23rd day of August, 1923.

RITA OHLSEN,
Notary Public,
New York County.

I HEREBY CERTIFY that I have examined the foregoing petition and in my opinion the piettion is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

CHARLES W. STOCKTON,
Attorney for Petitioner.

UNITED STATES SUPREME COURT.

In the Matter

—of—

The Petition of WILLIAM M. BARRETT as President of the Adams Express Company,

Petitioner,

—against—

ARTHUR H. VAN PELT,

Respondent,

for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Department, to bring before the Supreme Court the case of ARTHUR H. VAN PELT,

Plaintiff-Respondent,

—against—

WILLIAM M. BARRETT, as President of the Adams Express Company,

Defendant-Appellant.

Now comes the petitioner above named by Charles W. Stockton, his attorney, and moves

this Court upon a certified copy of the transcript of the record herein, and upon the annexed petition verified the 23rd day of August, 1923, for a writ of certiorari directed to the Appellate Division of the Supreme Court of the State of New York for the First Department to move before this Court the case of Arthur H. Van Pelt, plaintiff-respondent, against William M. Barrett, as President of the Adams Express Company, defendant-appellant, recently decided by the Appellate Division of the Supreme Court of the State of New York for the First Department for such proceedings herein as to the Court may seem just, and for such other and further relief in the premises as may be just.

CHARLES W. STOCKTON,
Attorney for Petitioner,
Office & P. O. Address,
2 Rector Street,
Borough of Manhattan,
City of New York.

KENNETH E. STOCKTON, ESQ.,
Of Counsel for Petitioner.

UNITED STATES SUPREME COURT.

In the Matter

—of—

The Petition of WILLIAM M. BARRETT as President of the Adams Express Company,

Petitioner,

—against—

ARTHUR H. VAN PELT,

Respondent,

for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Department, to bring before the Supreme Court the case of ARTHUR H. VAN PELT,

Plaintiff-Respondent,

—against—

WILLIAM M. BARRETT, as President of the Adams Express Company,

Defendant-Appellant.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

Statement of Facts.

This is an application to review by writ of certiorari a judgment of the Appellate Division of the Supreme Court of the State of New York,

affirming a judgment of the Supreme Court for New York County, entered in favor of the plaintiff for the sum of $3,345.65.

The action was brought to recover damages for loss in market value due to alleged delay in transportation of merchandise delivered to the defendant in the State of Kentucky for transportation to New York City on February 23, 1918.

The principal defense was that no claim in writing had been filed within the time required by the provisions of the Uniform Express Receipt, under which the shipment was transported. The plaintiff claims that the provisions of the First Cummins Amendment, passed March 4, 1915, made it unlawful for a common carrier to require the filing of written claims for delay. To this contention the defendant replies that the First Cummins Amendment, at most, prohibits the carriers requiring the filing of written claims in cases of negligent delay, that the burden of proof is on the shipper to prove such negligence and this is not satisfied by the mere proof of the fact of delay beyond a reasonable time for delivery.

The case, therefore, involves the proper interpretation of the First Cummins Amendment to the Interstate Commerce Act, and it is imperative that this Court should by its decision secure to carriers and claimants alike a fair and uniform application of this section of the Interstate Commerce Act throughout the entire United States.

POINT I.

The questions involved are of great public interest.

If the plaintiff's contention is correct, and the First Cummins Amendment to the Interstate Commerce Act prohibits common carriers from requiring the filing in writing of claims for delay as a condition precedent to recovery, it is apparent that the case is of great public interest. It is unnecessary to remind this Court that the volume of interstate commerce directly affects the daily life of practically every individual in the United States. The increased complexity of modern living conditions with the growth of large cities has transformed the interstate transportation of produce and merchandise from a luxury or a desirable facility to a matter of absolute and vital necessity. In the transaction of such a large volume of interstate business in the transportation of food products and other merchandise, it is apparent that there will arise a large number of claims for damages due to delay, either from a drop in the market price or from the actual deterioration to the shipment.

Any provision of the Interstate Commerce Act which directly touches on these claims for delay in transportation must be of great importance both to the carriers and the public at large. It is vital to both to know whether in a given case it is necessary to file a claim in writing against the carrier within a certain time in order to protect the claimant's rights and give the carrier an opportunity for a fair investigation.

Carriers are naturally desirous of inserting in their contracts of carriage some provisions requiring a reasonable notice to them of claims for loss and damage, so that they may complete their investigations while the transaction is fresh in the minds of their employees and others. This Court, prior to the enactment of the First Cummins Amendment, had unqualifiedly approved and sustained provisions in express receipts or bills of lading by which the carrier sought to require the filing of claims in writing in order to enable it to investigate the merits of such claims while the data was still obtainable, and it seems clear that there is nothing inherently unreasonable in such a requirement.

Georgia, etc., Railway v. *Blish Milling Co.*, 241 U. S. 190;
St. Louis, etc., Railway v. *Starbird*, 243 U. S. 592.

The present case is especially important in view of the fact that the Interstate Commerce Commission has now required the carriers to adopt a provision that "suits for loss, damage or delay shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof."

Such a provision is fair and reasonable but it is at once apparent that if it is unnecessary to file written claims for delay, the claimant's time for commencing suit on such claims will be automatically extended until two years after whatever time he shall see fit to present his claim and

have it rejected. Since the practical limit for the preservation of records by the carriers is three years, at the end of which period they are now authorized by the Interstate Commerce Commission to destroy their way-bills and records of individual shipments, it seems clear that the carriers would be absolutely defenseless in the face of a claim presented after that time.

If the First Cummins Amendment places any limitation upon their power to require the filing of written claims for delay, they have a right to be authoritatively advised of this fact, in order that they may obtain a revision of the present classifications to which they may be entitled either from the Interstate Commerce Commission or Congress.

POINT II.

There is now a conflict of judicial opinion as to the proper interpretation of the First Cummins Amendment to the Interstate Commerce Act.

In the case of *Southern Railway* v. *Bunch*, 109 S. E. 523, decided by the highest court of Georgia, the Court held that it was necessary to file claims for loss due to delay in transportation within four months after the date of delivery. The Court did not hand down any opinion with this decision.

In the case of *Conover* v. *Wabash Railroad Co.*, 208 Ill. App. 105, the Court of Appeals of Cook

County, an intermediate appellate court of Illinois, three judges sitting, held that the First Cummins Amendment prohibited carriers from requiring the filing of written claims for delay in transportation *due to the negligence of the carrier.*

In the case of *Hunt* v. *Hines,* 223 S. W. 798, the highest court of Missouri held that the First Cummins Amendment prohibited carriers from requiring the filing of written claims for delay in transportation.

The case of *Hailey* v. *Oregon Short Line*, 253 Federal 569, which is the only federal case in which the issues involved required a decision on this point, was decided in the District Court for the Southern District of Idaho. It held that the First Cummins Amendment prohibited carriers from requiring the filing of claims for delay in loading or unloading *due to negligence or carelessness of the carrier*, but that the burden of alleging and proving such negligence in order to bring the case within the terms of this exception to the Cummins Amendment was on the shipper. This case was brought to recover damages for delay in the transportation of a shipment of horses. The defendant pleaded the terms of the shipping agreement, and the plaintiff moved to strike out this defense. The Court held that the cause of action came under the phrase "damaged in transit by carelessness or negligence," saying:

> "So far as the facts in this case are concerned, the construction involves no lexical or grammatical difficulties. The damages claimed were not the result of delay or

injury in loading or unloading the horses; they were damaged 'in transit,' as that phrase is ordinarily understood, and by the carelessness and negligence of the carrier, if the averments of the complaint are true. The phrase 'carelessness and negligence' undoubtedly qualifies 'damaged in transit.'

In the case of a claim for damages suffered in the loading or unloading of a shipment, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in some particulars the grammatical construction is manifestly defective, and, that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in other respects the structure were artistic, perhaps a different view should be taken; but under the circumstances it is thought we are warranted in entirely ignoring the comma after 'unloaded' or inserting it after 'transit.' In this view the provision in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negligence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in there unloading it. A claimant must either allege and prove notice, and the filing of a claim, or must allege and prove negligence. Here the plaintiffs have alleged negligence, but neither the giving of notice nor the filing of a claim, and to succeed it will therefore be incumbent upon them to prove negligence."

The case of *Gillette Safety Razor Co.* v. *Daris*, 278 Federal 864, was decided by the Circuit Court of Appeals for the First Circuit. The claim involved in that case was for absolute failure to

deliver, so that the construction of the First Cummins Amendment with reference to claims for delay was not directly in issue. However, the Court did say by way of dictum:

> "Thus read it is clear that Congress intended by the language of the act that the carrier should be responsible for loss occasioned the consignee by the carrier's negligent delay, negligence in loading or unloading, and negligence in transit. In other words, the liability imposed, where the required notice is not given, is for negligence, and as to these matters it differs in no material respect from the liability of a warehouseman, who is liable for negligence only. *Southern Railway Co.* v. *Prescott*, 240 U. S. 632, 640, 36 Sup. Ct. 469, 60 L. Ed. 836."

The case of *Lissberger* v. *Bush Terminal*, 197 N. Y. 281, was decided by the Appellate Term for the First Department of the New York Supreme Court, on December 12th, 1922, three judges sitting. It held that the First Cummins Amendment did not prohibit the carriers from requiring the filing of written claims for delay in transportation, the Court saying at page :

> "It is obvious that the letters to the defendant demanding delivery of the shipment, and payment for its total value because of its supposed non-delivery, cannot be construed in any way as a claim made in writing for damages sustained because of mere delay in the delivery of the shipment, for which this action was brought. The contention of the plaintiffs that their claim comes within the excepted cases specified in the bill of lading so that they were not required to file any claim, is not

> well founded. An examination of the language of the bill, quoted above, shows clearly that the only cases in which notice is not required are: (1) Where the loss, damage or injury is due to delay or damage while being loaded or unloaded; and (2) where the shipment is 'damaged' in transit by carelessness or negligence.
>
> The instant case does not fall within either of the two excepted cases. The plaintiffs did their own unloading, and no claim arises under the first class of cases. The second class of excepted cases, in which no notice is required to be filed, is clearly confined solely to claims for 'injury' to a shipment 'damaged in transit by carelessness or negligence' of the carrier. In the instant case the claim is not one for damage in transit, but for delay in transit, and therefore a claim must be filed within the prescribed time of four months after delivery, even though the delay may have been due to negligence."

The case of *Bell* v. *New York Central Railroad Co.*, 175 N. Y. S. 712, 187 App. Div. 564, decided by the Appellate Division for the First Department of the New York Supreme Court, was the sole authority cited by the Court below in support of their decision in this case.

The Court in that case construed the Cummins Amendment as follows:

> "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to-wit: (1) Those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we call transit claims; and (2) those for loss

> otherwise sustained, which we call non-transit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a non-transit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of claim as a condition precedent to recovery, but authorized a requirement that suit be instituted within two years."

The Court did not specifically pass on the question as to whether or not it was necessary to file claims for delay in transportation, and whether or not the words "loss due to delay or damage while being loaded or unloaded" refer to any case of delay or merely to delay while being loaded or unloaded. Instead the Court divided all claims into two classifications—transit claims and non-transit claims—the first apparently covering all cases of damage in transit and the second applying only to cases of actual failure to deliver.

Thus we see that various courts have already differed as to the precise interpretation of this provision of the First Cummins Amendment, and in default of any authoritative expression of the law from this Court, it is probable that future decisions of other courts will contain similar discrepancies.

POINT III.

All the provisions of the Interstate Commerce Act should be uniformly interpreted and applied throughout the United States.

The fundamental purpose of the Interstate Commerce Act was to bring an end to the practice of rebates and discriminations which prevailed prior to its adoption and to secure to all shippers throughout the United States equal facilities. Not only has the fundamental purpose of the Act to prevent discriminations in favor of particular shippers or localities been extended to apply to every phase of transportation problems, but the same principle of uniform treatment has been applied to all phases of the relations between shippers and carriers, so that a carrier is just as much legally bound to assert against all shippers the defenses which it asserts against any as it is to give the same service to all shippers at the same rates.

> *Georgia, etc., Ry.* v. *Blish Milling Co.*, 241 U. S. 190;
> *Phillips* v. *Grand Trunk*, 236 U. S. 662.

It is submitted that the fundamental purpose of the Interstate Commerce Act demands that this Court authoritatively interpret any provisions of the Cummins Amendment which may be ambiguous, especially whenever it appears that different interpretations of such section of the

Interstate Commerce Act will give to claimants in certain localities of the United States peculiar advantages over claimants in other localities. Certainly, if claimants in the State of Georgia must file in writing their claims for delay and bring suit on these claims within two years after their rejection, while claimants in New York are not compelled to file their claims in writing and have an unlimited time for bringing suits on claims for delay, there is an open and manifest discrimination of the most flagrant kind. Moreover, if claimants in Illinois and Idaho must affirmatively prove that the negligence which caused the delay was due to the fault of the carrier in order to excuse their failure to file a claim, while claimants of New York can recover without proof of anything except the mere fact of delay, there will again result a very real and unjust discrimination.

POINT IV.

The decision of this Court will settle the interpretation of the First Cummins Amendment to the Interstate Commerce Act and will bring about its uniform application throughout the United States.

Since the enactment of the Interstate Commerce Act and the amendments thereto, this Court has uniformly held that the field of regulation of the agencies of interstate commerce has been taken over by Congress and that the state

legislatures have no longer the power in any way to regulate or burden interstate commerce, or the state courts the right to deny to parties any rights or privileges which they might have under the Interstate Commerce Act or the federal decisions concerning it.

Croninger v. *Adams Express Company*, 226 U. S. 491;
Postal Telegraph-Cable Company v. *Warren-Godwin Lumber Co.*, 251 U. S. 27.

The decisions of the state courts in construing the Interstate Commerce Act with reference to interstate shipments have uniformly followed the construction adopted down by this Court, even when it involved a reversal of the principles of law previously enunciated by them.

Western Union Tel. Co. v. *Bank of Spencer*, 53 Oklahoma 398;
Haskell Implement Co. v. *Postal Tel.-Cable Co.*, 114 Maine 277;
Western Union Tel. Co. v. *Bilisoly*, 116 Virginia 562;
Bailey v. *Western Union Tel. Co.*, 97 Kansas 619;
Durre v. *Western Union Tel. Co.*, 165 Wisconsin 190;
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Western Union Tel. Co. v. *Lee*, 174 Kentucky 210;

Carbic Mfg. Co. v. *Western Express Co.*, 184 N. W. 35 (Minn.);
Kahn v. *American Railway Express Co.*, 106 S. E. 126 (W. Va.);
Nashville, etc., Ry. v. *Camper*, 78 So. 925 (Ala.);
Metz Co. v. *Boston & Maine R. R.*, 116 N. E. 475 (Mass.).

POINT V.

The construction placed by the Court below on the First Cummins Amendment was erroneous.

It is submitted that there are at least three grounds which should be persuasive in construing the provisions of the First Cummins Amendment, and all of them point toward a different construction from that adopted by the Court below.

(a) The grammatical construction of the First Cummins Amendment and the plain meaning of the words used clearly indicate an intention on the part of Congress that carriers should not be deprived of the right to require the filing of written claims for delay in transit.

In the first place, this provision is inserted as an exception to the general authority permitting carriers to require the filing of written claims for loss and damage as a condition precedent to recovery. If Congress had intended to limit the right to require the filing of a claim to cases of

actual failure to deliver, it would have used language designed to clearly indicate such an intent. Such a purpose would have been easy to express in simple language and it cannot be supposed that Congress had in mind such simple and easily defined classifications when it inserted the complicated exception to the general authorization for requiring the filing of written claims.

Moreover, it is a well recognized rule of construction that specific exceptions to the general rule of law enunciated by a statute should be strictly construed.

> "The enacting clause is of course the principal part of the statute, and, as its terms may be presumed to have embodied the main body of the act, the proviso should be strictly construed."

See 36 Cyc. 1162, and cases cited.

In the second place, the punctuation clearly indicates that the draftsman intended that the exception should cover two general classes of claims, and these classes were marked off by commas. These two classes of claims are those arising in loading or unloading, which may be due either to damage or to delay in loading or unloading, and those arising in transit. If it had been intended to create three classes of claims (1) loss due to delay, (2) loss due to damage while being loaded or unloaded, and (3) loss due to damage in transit, it is clear that a comma would have been inserted after the word "delay" as it is inserted after the word "unloaded." There is no doubt that this section is clumsily worded, but it is obvious from the

punctuation that there are only two forms of exceptions to the requirements of filing of claims: (1) delay or damage *while being loaded or unloaded,* and (2) damage in transit by carelessness or negligence.

> (b) The circumstances surrounding the adoption of the First Cummins Amendment indicate clearly that the word "delay" was meant to be read in connection with the words "while being loaded or unloaded."

This amendment was adopted because of the agitation all over the country over the decision in the case of *Croninger* v. *Adams Express Company,* 226 U. S. 491. While its principal force was directed toward the practice of released values which were sanctioned in the *Croninger* case, it was also felt that many of the requirements adopted by some of the carriers with reference to the filing of claims for loss and damage were unreasonably harsh. In some cases these requirements were as low as from one to five days, and while perhaps reasonable from the viewpoint of the carrier alone were not practicable for the great body of shippers.

The agitation for relief both as to the valuation feature and the limitation for filing claims was created principally by the shippers of live stock who claimed to be the principal sufferers from the existing forms of carrier contracts. On perusing the discussions in the House of Representatives and the Senate attendant upon the adoption of the First Cummins Amendment (Congressional Record, Volume 51, pp. 9616 to 9626, 9777 to 9783, vol. 52, pp. 5446 to 5451) one is immediately struck with the fact that the illus-

trative cases used are confined practically entirely to shipments of live stock and that the hardships of the shippers which it was claimed the amendment would remedy were the hardships of live stock shippers. It was the same general force of popular agitation initiated by the live stock shippers which caused the adoption of the 28-hour law, providing that railroad companies should not keep live stock in cars longer than 28 hours without unloading for rest and food. When one holds this fact in mind the provisions of the First Cummins Amendment immediately become clear.

So far as the transportation of inanimate objects is concerned, it is clear that any exception as to damage while being loaded or unloaded is one that would be practically insignificant. Even if such damage were of sufficiently common occurrence to make it worth while specifically to except from the general operation of the Act, it seems clear that it would, as a practical matter, be impossible ever to prove that an inanimate object which was delivered in a damaged condition had been injured while being loaded or unloaded. However, when you remember that the draftsman of this provision had in mind the existing evils with reference to shipments of live stock, the section becomes at once full of meaning. The greatest source of loss and damage claims in the case of live stock shipments was the delay in loading or unloading shipments of live stock. Animals would be delivered by the shipper to the carrier and placed in a pen at the railroad station where they would be kept for one or two days before the necessary car facilities could be procured. A similar situation

would often arise at the point of destination and such delay in loading and unloading caused a considerable loss in weight and sometimes more serious injuries to the animals. It was to cover such a case that the exception in question was inserted in the Cummins Amendment.

Bearing in mind the circumstances under which the amendment was adopted, it seems clear that Congress intended that the word "delay" should explain and amplify the exception with reference to loss and damage sustained in connection with the loading and unloading of live stock shipments.

> (c) The result of a decision by this Court construing this section of the First Cummins Amendment broadly to prohibit carriers from requiring the filing of written claims in all cases of "transit claims" would be very far-reaching and unfair.

In the first place it would practically nullify the obvious intention of the framers of the Cummins Amendment to authorize carriers, in the case of ordinary claims, to adopt reasonable requirements for the filing of written notice of claims. It would restrict the adoption of such requirements to the cases where the claim arose out of some circumstances *unconnected* with the loading, transportation or unloading of the shipment. The only remaining conceivable form of claim would be one for damages for the carriers' failure to make delivery. Yet there is as much reason for requiring the filing of claim for delay as there is for requiring the filing of a claim for loss. The carrier may have any one of a number of defenses to a claim for delay, if it is due to

the act of God or other causes excepted by the shipping contract or by a general congestion. In order to establish the causes for the delay to a particular shipment, it is just as necessary to know seasonably that there is a claim with reference to a particular shipment as it is in the case of a failure to deliver.

The requirement that a notice of claim be filed within not less than four months from the time of delivery is perfectly reasonable. It is as reasonable in the case of a claim for delay as it is in the case of a claim for loss or damage. No argument can be advanced why a carrier should not be allowed to make such a requirement or why it should be expressly prohibited by statute. It is submitted that the language of the exception contained in the Cummins Amendment should be strictly construed as in the case of all exceptions, and that it should not be extended beyond its clear requirements to prevent the carriers from protecting themselves against unseasonable delay in presentation of claims.

WHEREFORE, it is respectfully submitted that the writ of certiorari should issue as prayed.

August 23, 1923.

CHARLES W. STOCKTON,
Attorney for Petitioner.

KENNETH E. STOCKTON,
Of Counsel for Petitioner.

IN THE

United States Supreme Court.

In the Matter

of

The Petition of WILLIAM M. BARRETT, as President of the Adams Express Company,

Petitioner,

—against—

ARTHUR H. VAN PELT,

Respondent,

for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Department, to bring before the Supreme Court the case of ARTHUR H. VAN PELT,

Plaintiff-Respondent,

—against—

WILLIAM M. BARRETT, as President of the Adams Express Company,

Defendant-Appellant.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION.

It has been called to our attention that paragraph four of the petition for a writ of certiorari, which sets forth in full the provisions of Section VII of the Uniform Express Receipt, as contained in the published and filed schedules and tariffs in effect on February 23, 1918, does not cite the

page of the record from which it is derived. This excerpt is not taken from the record, but directly from the Uniform Express Receipt provided for on page 6 of the Official Express Classification No. 25 issued May 15, 1917, effective July 1, 1917, filed with the Interstate Commerce Commission under its number I. C. C. A-2130, which was effective up to July 1, 1918. This was filed with the Interstate Commerce Commission on May 18, 1917.

These were not formally introduced in evidence because the Trial Court took judicial cognizance of them under the authority of *United States* v. *Wells Fargo & Co.*, 271 Fed. 180, 183, no objection being made thereto by the plaintiff's counsel.

Thereafter the Appellate Division took judicial notice of said provisions of the Uniform Express Receipt contained in such schedules and tariffs, as set forth in the appellant's brief before that Court, without objection by the plaintiff's counsel.

Since this Court has repeatedly held that the provisions of the duly filed tariffs and schedules have the effect of law and are binding alike on the shipper and carrier, there seems to be no room for argument but that it was proper for the Trial Court to take judicial notice of their provisions.

United States v. *Wells Fargo & Co.*, *supra*;

American Railway Express Co. v. *Lindenburgh*, 67 Law. Ed. 227;

Boston & Maine v. *Hooker*, 233 U. S. 97;

Southern Railroad v. *Prescott*, 240 U. S. 632.

This is especially so where no objection has been made by counsel on either side to the Court's taking judicial notice of such facts.

Morgan's Louisiana, etc., SS. Co. v. *Isaac Joseph Iron Co.*, 243 Fed. 149, 156 CCA 15.

Neither the intentional nor accidental mis-statements of the applicable rate are binding on the carrier or shipper.

Kansas City Southern R. R. Co. v. *Carl*, 227 U. S. 639.

The rate, when made out and filed, is notice to everyone and this is not affected by the fact that it is not actually posted in the carrier's station.

Texas & Pacific Railroad v. *Mugg*, 202 U. S. 242;

Chicago & Alton Railroad v. *Kirby*, 225 U. S. 155.

To hold otherwise would, as a practical matter, result in permitting the plaintiff to secure the benefits of effecting a shipment upon more favorable terms than those prescribed by the Interstate Commerce Law for all other shippers under the Uniform Express Receipt.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

WILLIAM M. BARRETT, as President of the Adams Express Company,

Petitioner,

—against—

ARTHUR H. VAN PELT,

Respondent.

PETITIONER'S BRIEF.

Statement.

This is an appeal by writ of certiorari from a judgment of the Appellate Division of the Supreme Court of the State of New York, affirming a judgment of the Supreme Court of New York entered in favor of the plaintiff and against the defendant for the sum of $3,345.65.

The action was brought to recover damages for loss due to decline in market value because of alleged delay in the transportation of a shipment of eggs delivered to defendant for transportation from Louisville, Kentucky, to New York City on February 23, 1918. There was no evidence whatsoever of any physical damage to the shipment by reason of the delay or any other cause. The plaintiff *did not allege in his complaint or offer on the trial any proof of negligence on the part of the defendant except the alleged failure to deliver within a reasonable time.* It is admitted that no

claim for damages was filed until October 4, 1918, seven months after the shipment was delivered (Def. Ex. I).

No evidence was introduced on behalf of the defendant except testimony to show a difference between a so-called "tracer" and a claim (Record, pp. 75-79).

The principal defense was that plaintiff had not filed a claim in writing within four months from the delivery of the shipment, as required by the provisions of the Uniform Express Receipt, under which the shipment was transported. This defense was not affirmatively pleaded in the answer, and the trial Judge held that by failing to plead this defense affirmatively the defendant had waived it and lost the right to avail itself of it (Record, p. 85).

On the appeal to the Appellate Division, that court held that if the provisions of the Uniform Express Receipt required the plaintiff to file a written claim within any specified time they were void under the provisions of the Act to Regulate Interstate Commerce, and subsequent amendments thereto, particulahly that of March 4, 1915, known as the First Cummins Amendment (Record, p. 87).

Specification of Errors.

It is submitted that the said Appellate Division of the Supreme Court of the State of New York for the First Department erred in entering the aforesaid judgment in the following particulars:

1. The Court erred in holding that the so-called First Cummins Amendment to Section 20 of the

Interstate Commerce Act (38 Statutes, 1196-1197, Chap. 176, amending 24 Stat. 386, Section 20, as amended by 34 Stat. 593, 595, Section 7), prohibited the petitioner from requiring the filing of claims within four months after the delivery of shipments when such claims were for monetary damages growing out of delay in transportation resulting solely in a decline in market value and not in physical damage to the shipment.

2. The Court erred in failing to hold that the respondent had failed to bring himself within the application of the First Cummins Amendment hereinabove referred to by failing to affirmatively plead and prove that the delay complained of was due to the negligence and carelessness of the appellant.

3. The Court erred in failing to hold that the appellant could not waive the requirements of the Uniform Express Receipt as conditions precedent to recovery, and that the appellant's failure to plead affirmatively such provisions in its answer did not deprive it of the right to avail itself of such defense on the trial.

Petitioner's Points.

The petitioner's contentions on this appeal are as follows:

(1) The provisions of the Uniform Express Receipt required the plaintiff to file a claim within four months from the time of delivery as a condition precedent to recovery and these conditions

of the receipt were valid and enforcible under the Interstate Commerce Act and the various amendments thereto.

(2) Even if the Interstate Commerce Act prohibited, under certain circumstances, the requirement that claims for loss of market value due to delay in transportation should be filed within a specified time, such prohibition is in the form of an exception, which is limited to cases where the delay is a negligent one and such negligence must be affirmatively pleaded and proved by the claimant.

(3) The defendant could not waive the requirements lawfully inserted in the Uniform Express Receipt as conditions precedent to recovery and its failure to plead affirmatively such provisions in its answer did not deprive it of the right to avail itself of such defense.

POINT I.

The provisions of the Uniform Express Receipt required the plaintiff to file a claim in writing within four months from the time of delivery as a condition precedent to recovery, and these conditions were valid and enforcible under the Interstate Commerce Act and the various amendments thereto.

(a) *Stipulations inserted in a carrier's receipt reasonably limiting the time for filing of claims were valid at common law and have been uniformly upheld by this Court.*

The carrier's right to require the filing of written notice of claim within a reasonable time as a condition precedent to recovery for loss, damage or delay, has been established by a long line of decisions in this Court. Such stipulations contravene no public policy. They are held to effectuate a salutary purpose. They work no hardship on the shipper and are of great assistance to the carrier in facilitating the early investigation of claims. This Court uniformly has upheld such stipulations as both reasonable and valid.

Express Co. v. *Caldwell*, 88 U. S. 264;
M. K. & T. Ry. Co. v. *Harriman Bros.*, 227 U. S. 657;
G. F. & A. Ry. Co. v. *Blish Milling Co.*, 241 U. S. 190;
C. & O. Ry. Co. v. *McLaughlin*, 242 U. S. 142;
St. L. I. M. & S. Ry. v. *Starbird*, 243 U. S. 572;
Erie R. Co. v. *Stone*, 244 U. S. 332;
So. Pac. v. *Stewart*, 248 U. S. 446;
B. & O. R. Co. v. *Leach*, 249 U. S. 217;
Erie R. Co. v. *Stuart*, 250 U. S. 465;
T. & P. Ry. Co. v. *Leatherwood*, 250 U. S. 478.

In *Georgia F. & A. Ry. Co.* v. *Blish Milling Co.*, *supra*, a stipulation requiring the filing claims for loss, damage or delay in writing within four months was held a reasonable stipulation. In that case the shipment was delivered to the wrong consignee but the Court held that such notice in writing of claim may be reasonably required by a carrier even in cases where the loss or damage was caused

by the carrier's own negligence. The Court in deciding this question said:

> "It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a mis-delivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

It should be noted that the decisions above cited are not based upon any statutory permission, but represent the common law as declared by the decisions of this Court and as such are binding on all the Courts of this country in so far as they laid down the law with reference to interstate commerce (*Adams Express Company* v. *Croninger*, 226 U. S. 491).

(b) *The proviso in the First Cummins Amendment, being an exception and in derogation of the common law, must be strictly construed.*

In March, 1915, Congress passed Chapter 176,

Act of Congress, March 4, 1915, otherwise known as the First Cummins Amendment to Section 20 of the Interstate Commerce Act, the portion material in this case reading as follows:

> "Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.*" (Italics ours.)

This Statute is in derogation of the common law as previously declared by this Court, and must be strictly construed. *Lewis' Sutherland Statutory Construction*, 2nd Ed., Vol. 2, Sec. 454, p. 862.

Moreover, this provision must be strictly construed because it is an exception.

> "The enacting clause is, of course, the principal part of the statute, and, as its terms may be presumed to have embodied the main body of the Act, the proviso should be strictly construed."

See

36 Cyc. 1162;

U. S. v. *Dickson*, 15 Peters, 141, 163;

Georgia Banking Co. v. *Smith*, 128 U. S. 174, 181;
Interstate Commerce Comm. v. *Baird*, 194 U. S. 25, 36, 37;
American Express Co. v. *U. S.*, 212 U. S. 522, 534.

The present proviso may well be termed an exception of exceptions, since it is an exception to the more general provisos in the Act providing reasonable minimum limits beyond which the carriers may not go in requiring the filing of claims and the institution of suits, and it would seem to follow that such a proviso should be more strictly construed than the ordinary proviso to a general provision.

(c) *The grammatical construction of the proviso and the plain meaning of the words used clearly indicate an intention that the word "delay" in this exception was meant to be read in connection with the words "while being loaded or unloaded."*

The effect of the proviso in the First Cummins Amendment and in the Uniform Express Receipt drawn in conformity therewith, is plain when construed as written and punctuated. For the purposes of charity and ready reference, we restate them separately in two columns, (a) being the proviso in the Statute, and (b) the provision in the Uniform Express Receipt:

(a)	(b)
"Provided f u r t h e r, that it shall be unlawful for any such com-	"except where the loss, damage or injury complained of is due to

mon carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.*" (Italics ours.)

delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; * * *"

The punctuation clearly indicates that there were two general classes of claims which should be excepted from the general permission granted to carriers to insert stipulations in their bills of lading requiring the filing of claims and institution of suit. These classes are—First, claims for delay or damage in loading or unloading, and, Second, claims for damage in transit by carelessness or negligence. If the word "delay" has no relation to the phrase "while being loaded or unloaded," it is obvious that there was no reason for inserting a comma after the word "unloaded." If there had been no comma inserted after the word "unloaded," or if there had been commas

after both "delay" and "unloaded," it would seem reasonable to assume that the draftsman of the bill intended that there should be three general classes of exceptions. The fact that he used a comma in one place and did not use it in another would indicate that he had the definite purpose of marking off two general classes of claim, *i. e.*, (1) delay or damage while being loaded or unloaded, and, (2) damage in transit.

While it is true that the section is clumsily worded, it cannot be presumed that its draftsman was totally ignorant of the use of every day punctuation. As we shall show in our discussion of the history of the provision, the identical language and punctuation appears in a bill introduced in the House of Representatives and in the amendment introduced in the Senate. Under such circumstances, we submit that it cannot be presumed that the commas were indiscriminately sprinkled into the provision like salt from a shaker without any intent that they should occupy a particular place to serve a particular purpose. The language of the provision is capable of an intelligent interpretation, giving its fullest significance to the punctuation as placed. Such interpretation does no violence to the actual intention of the framers of the provision and is not inconsistent with the previous decisions of this Court with reference to limitations concerning the filing of claims. Under such circumstances the punctuation cannot be disregarded and should be controlling.

(d) *This construction of the proviso is supported by the circumstances surrounding the*

adoption of the First Cummins Amendment and the purpose sought to be accomplished thereby.

The plaintiff's best argument against construing the section as it reads, is the apparently insignificant classification which would be created by an exception referring to claims for "delay * * * while being loaded or unloaded." He can very plausibly urge that so far as the ordinary shipper is concerned, the number of claims in which the damage is caused by delay in loading or unloading is small, and the number of cases where such damage can be proved to have occurred in this manner is even smaller.

However, this argument overlooks the history of this legislation. *This amendment was not put in for the benefit of the ordinary shipper*, it was adopted solely for the benefit of and because of the insistent demands of the livestock shippers of Texas, Missouri, Kansas, Iowa and other cattle-raising states.

The records of the proceedings in Congress and the reports of the Congressional Committees are relevant in ascertaining the intent of Congress in enacting legislation. (*St. Louis & Iron Mountain Ry. Co.* v. *Craft, Admr.*, 237 U. S. 660, 661.) These reports and the discussion before the Committees substantially corroborate the interpretation we place upon this proviso.

The first time the precise language of this provision appears in the record of the proceedings of Congress is in a bill presented by Representative Borland of Missouri on December 14, 1913 (H. R. Bill 10309, 62nd Cong., 2nd Session). This bill was referred to the Committee on Inter-

state Commerce but no further action appears to have been taken on it. It provided as follows:

> "A BILL TO AMEND AN ACT TO REGULATE COMMERCE BY FORBIDDING COMMON CARRIERS FROM LIMITING THE TIME FOR FILING CLAIMS.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass.
>
> It shall be unlawful for any common carrier to provide, by rule, contract, or regulation, a shorter period for giving notice of claims than ninety days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.
>
> It shall be unlawful for any common carrier, by receipt, rule, contract, or regulation, to exempt itself from the full amount of damage caused by it or by any carrier, railroad or transportation company over which the property may pass, or from the liabilities hereby imposed: *Provided, how-*

ever, That in the enforcement of the liability hereby imposed, the holder of such receipt or bill of lading shall have all the rights and remedies existing under the laws of the state where the suit is instituted."

In referring to this bill in the subsequent debates in the House on the Cummins Amendment, Mr. Borland said that the only purpose of the provision with reference to the limitation time for filing claims was to forbid the carrier to fix an unreasonable time for filing claims (Cong. Rec., Vol. 52, p. 5449). There was nothing in his statement from which it could be inferred that he intended practically to deprive the carriers of the right to require the filing of claims within a reasonable time for all except a few classes of claims.

This provision did not appear in the original text of the Cummins Amendment as first presented to the Senate on February 18, 1914 (S. 4522, 63rd Cong., 2nd Session). That bill referred only to the question of limitations of value. Nor was the provision taken up or discussed at the hearings before the sub-committee of the Senate Committee on Interstate Commerce, At pages 12, 48 and 49 of the Report of the proceedings at the hearings before this sub-committee on March 17, 1914, some reference is made to an amendment apparently proposed, providing that until the Interstate Commerce Commission has affirmatively acted upon the matter, it should be "unlawful to incorporate in any such receipt, bill of lading, contract, rule, regulation, or tariff any limitation respecting the time within which notice of such loss, damage, or injury, shall be given

or suit therefor begun." However, no part of this provision was inserted in the bill with proposed amendments, which was favorably reported to the Senate by the Committee on Interstate Commerce (Report 407, 63rd Cong., 2nd Session). In fact, as so reported, the bill contained no provision whatsoever with reference to requirements for filing claims or commencing suit. Because of the pressure of important legislation pending in the Senate at the time, it was only by the most strenuous efforts that Senator Cummins was able to secure the prompt consideration of his bill after it was reported back by the Committee on Interstate Commerce. The Congressional Record shows that only a certain time was allowed for the discussion of the bill and practically all this time was taken up in the discussion of the provisions prohibiting the limitation of value (Congressional Record, 53rd Cong., 2nd Session, Vol. 51, pp. 9619, 9777, 9783). At the last moment Senator Sheppard of Texas offered an amendment in the form of the provision in question in this suit, which he had apparently taken *in toto* from Representative Borland's bill. There was no discussion of the amendment in the Senate and it was adopted without a roll call. In fact, in referring to the language of this amendment in a subsequent hearing before the House Committee on Interstate Commerce, it was frankly stated that owing to the shortness of the time and the pressure of other legislation, a number of amendments that had been proposed were given away and others accepted in order to get the bill through in the morning hour (Report on Hearings before sub-committee of the House Committee on Interstate and

Foreign Commerce, 63rd Cong., 2nd Session, September 24th, 25th and 30th, 1914, p. 163).

The only reference made by a shipper's representative at the hearings before the House sub-committee with reference to a limitation on the time for filing claims was by a Mr. Farrar. While he complained of the injustice of the existing requirement of some carriers that claims must be filed within 10 days, he expressly admitted that there ought to be a reasonable time limit within which shippers should be compelled to file their claims (Hearings before House sub-committee on "Bills Proposing to Amend the Carmack Amendment," pp. 22, 23).

An examination of the discussion in the proceedings before both the Senate and House sub-committees will indicate at once that the sponsors for the Cummins Amendment were primarily the live stock interests of the country. In fact, the circumstances under which the amendment came to be proposed are frankly set out in the statement of Mr. Sykes, president of the Cornbelt Meat Producers Association of Iowa, before the House Committee at pages 44 and 45 of the Report of Proceedings. Thus, the principal speakers before the House Committee in support of the bill were Mr. Sykes, Mr. J. W. Farrar, representing the Kansas City Live Stock Exchange; Mr. A. F. Striker, representing the South Omaha Live Stock Exchange; Mr. J. H. Henderson, Commerce Counsel for the State of Iowa and Mr. S. H. Cowen, attorney for the American National Live Stock Association. It is significant to note that Mr. W. H. Chandler, representing the Boston Chamber of Commerce, and Mr. J. C. Lincoln,

traffic manager of the Merchants Association of New York City, who also represented the Philadelphia Chamber of Commerce and the National Industrial Traffic League, appeared in opposition to the bill and claimed without any real contradiction that they represented 95 per cent. of the shippers of the country who did not desire the bill adopted in its form at that time. It was clearly a case of live stock growers insisting upon and obtaining a passage of an amendment which was opposed by a great body of shippers. We do not contend that the diversity of opinion between the two bodies had anything to do with the provision in question in this suit. However, it does most significantly indicate the fact that the provision was drafted on behalf of the live stock producers and for their benefit only. The bill was not sponsored by any shipper or organization of shippers except those directly concerned with the live stock business, and as we shall see this fact is highly significant in the interpretation of what would otherwise have been an apparently obscure exception to the general rule laid down by the amendment.

Bearing these facts in mind, let us examine anew the language of this provision in question.

> "*Provided further,* That it shall be unlawful for any common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years; *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being

> loaded and unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

It will be seen at once that viewed from the angle of a live-stock shipper, a classification including claims for "delay * * * while being loaded or unloaded," is alive with significance and constitutes a very important class of claims. This was one of the chief grievances which live stock shippers had against the carriers and one of the most fertile sources of claims. The movement of livestock and particularly "feeders" from the corn belts was largely dependent upon market conditions in the great packing centers like Kansas City or Chicago. What the shippers wanted and what the bill intended, was that the railroad companies should be compelled to furnish cars for prompt loading when livestock shipments were tendered and that such shipments should be loaded and unloaded at feeding stops or destination with the utmost dispatch. We submit, therefore, that viewed from the standpoint of the live-stock shippers, the natural grammatical construction of this provision is significant and reasonable. It applies to a class of claims of sufficient importance to make it reasonable to assume that it was desired to make it the subject matter of an exception.

(e) *The Court below decided this case solely on a dictum in a previous case in which the present point was not in any way involved.*

In arriving at its conclusion the Court below set forth no grounds for its ruling except its previous decision in the case of *Bell* v. *N. Y. C. R. R. Co.*, 187 App. Div. 564, in which it said:

> "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to-wit: (I) those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and those for loss otherwise sustained, which we will call non-transit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a non-transit claim within four months, and in such case to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of a claim as a condition precedent to recovery but authorized a requirement that suit be instituted within two years."

However, in the *Bell* case the shipment, which consisted of pears, was not only delayed in transit but the car was not properly placed for delivery and several of the containers were broken open and the contents bruised and crushed. It arose on a motion to strike out as insufficient in law the carrier's defense that suit was not commenced within two years after delivery. There was no issue in the case either with reference to the filing of claims or the construction of the clause "delay or damage while being loaded or unloaded." The Court's decision of claims into transit and non-transit claims was quite uncalled for by the facts before it for decision and the quotation cited as the bases of the decision in this case was purely *obiter dicta*.

Summary.

It thus appears that the ordinary rules of grammatical construction, the ordinary rules of legal construction applying to the interpretation of exceptions and provisos, and finally the circumstances surrounding the adoption of this amendment all point to the construction of this clause adopted by the defendant. The requirement that claims for delay in transportation should be filed has already been approved by this Court as fair and reasonable. No plausible reason of public policy can be assigned for prohibiting the incorporation of such reasonable requirements in shipping contracts—in fact public policy points the other way.

To construe the exception as prohibiting the carriers from requiring the filing of written claims for delay extends it to a large and important class of claims where fairness requires that the carrier have a reasonable opportunity to investigate. It is true that some courts have, upon a superficial consideration of the question, asserted that the reasons for permitting a carrier to require notice of claims for loss or physical damage did not apply in the case of loss of market value due to delay in transit. Such a statement is apparently based upon the assumption that market values would be as easily ascertainable on a delayed investigation as on a prompt one. However, it overlooks the vital fact that *the delay* which causes a decrease in market value *may have been due to a cause excepted in the transportation contract*, for which the carrier is not chargeable. It is as important from the carrier's

point of view to have prompt information concerning a claim for delay in order that it may seasonably investigate into the causes of the delay as it is to have prompt notice of claims for damage. In each case the carrier may have a defense based as much on the cause of the damage as on its extent.

It may not be amiss to call the Court's attention to the fact that under the Transportation Act of 1920, the provision of the Cummins Amendment involved in this suit was amended to read as follows:

> "Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice" (41 Stat. L. 494).
>
> "Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

We believe that the spirit of this amendment and the purpose which it sought to accomplish was fair and just. However, it is apparent that where the carrier cannot require the filing of

the claim for damages, the claimant's time to bring suit will be indefinitely extended until such time as he chooses to present his claim and have it acted upon by the carrier. This will subject the carrier to the harassment of suits brought long after its records have been destroyed and its employees' recollections of the individual transaction have been forgotten. We do not believe the Court should adopt a construction of this proviso of the Cummins Amendment which cannot be reasonably justified in its immediate application and is so unjust in its consequential application unless the intention Congress unmistakably appears to have been t. nclude in the proviso the broad classification of claims for mere delay in transit.

POINT II.

Even if the Interstate Commerce Act does not permit a carrier to require the filing of a claim for delay in transit due to carelessness or negligence, this exception only applies where the carriers' negligence is both pleaded and proved.

If the punctuation be entirely disregarded, as demanded by the plaintiff, and if it be held that there are three classes of exceptions to the general rule permitting a requirement for the filing of claims; *i. e.*, (1) delay, (2) damage while being loaded or unloaded, and (3) damage in transit, it is submitted that the exception within which the plaintiff must bring his case is one of delay due to the carelessness or negligence of the carrier.

Such is the position taken by the Federal District Court for the Southern District of Idaho, *Hailey* v. *Oregon Short Line*, 253 Fed. 569, the Circuit Court of Appeals for the First Circuit, *Gillette Safety Razor Co.* v. *Davis*, 278 Fed. 864, and an intermediate appellate court of Illinois, *Conover* v. *Wabash R. R. Co.*, 208 Ill. App. 105. Neither of the cases in the Federal Court actually involved the construction of the phrase "delay or damage while being loaded or unloaded," but in construing the succeeding clause of the Act they held by way of dictum that the phrase "carelessness or negligence" referred to all the exceptions in this proviso.

Thus in the *Hailey* case, Federal District Judge Dietrich said:

> "So far as the facts in this case are concerned, the construction involves no lexical or grammatical difficulties. *The damages claimed were not the result of delay or injury in loading or unloading the horses; they were damaged 'in transit,'* as that phrase is ordinarily understood, and by the carelessness and negligence of the carrier, if the averments of the complaint are true. The phrase 'carelessness and negligence' undoubtedly qualifies 'damaged in transit.'
>
> In the case of a claim for damages *suffered in the loading or unloading of a shipment*, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in some particulars the grammatical construction is manifestly defective, and that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in other respects the structure were artistic perhaps a different view

> should be taken; but under the circumstances it is thought we are warranted in entirely ignoring the comma after 'unloaded' or inserting it after 'transit'. In this view the provision in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negligence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in their unloading it. A claimant must either allege and prove notice, and the filing of a claim, or must allege and prove negligence. Here the plaintiffs have alleged negligence, but neither the giving of notice nor the filing of a claim, and to succeed it will therefore be incumbent upon them to prove negligence." (Italics ours.)

In the *Gillette Safety Razor Comapny* case, the damage consisted of the total loss of the shipment, but the Circuit Court of Appeals for the First Circuit said:

> "Thus read it is clear that Congress intended by the language of the act that the carrier should be responsible for loss occasioned the consignee by the carrier's negligent delay, negligence in loading or unloading, and negligence in transit. In other words, the liability imposed, where the required notice is not given, is for negligence, and as to these matters it differs in no material respect from the liability of a warehouseman, who is liable for negligence only. *Southern Railway Co.* v. *Prescott*, 240 U. S. 632, 640, 36 Sup. Ct. 469, 60 L. Ed. 836."

It seems clear that if the word "delay" relates to the words "negligence or carelessness," the

burden is on the claimant to prove the facts which take his case out of the general rule requiring the filing of claims in writing. There is abundant authority for the proposition that where a claimant relies upon a particular fact to take his case out of the operation of a general limitation in favor of the carrier, the burden of proving this fact is on him.

Schlemmer v. *B. R. & P. Ry.*, 205 U. S. 110;
Javierre v. *Central Altagracia*, 217 U. S. 502, 507, 508;
Cochran v. *Dinsmore*, 49 N. Y. 249;
Platt v. *Richmond, etc., R. R.*, 108 N. Y. 358;
Whitworth v. *Erie*, 87 N. Y. 413.

The respondent contends that even if this is so, the mere proof of an unreasonable delay creates a presumption of negligence which brings his case within the exception contained in the Act and relieves him of the necessity of proving the filing of a written claim. If the exception did not contain the words "by carelessness or negligence," the respondent's contention would be permissible as he would have complied with the requirement of the law that he affirmatively allege and prove the fact which brings his case within the exception of which he is seeking to take advantage by merely proving that his claim was one for delay. However, the insertion of the words "by carelessness or negligence" limited the exception by more specifically describing the claims in which the plaintiff did not have to file a written claim. The addition of these words

requires the plaintiff not only to prove that his claim was one for delay but that it is one for delay due to negligence or carelessness of the carrier. In determining whether or not the plaintiff has made out a case within the language of the *exception* contained in the Cummins Amendment, we must be guided by an entirely different measure of proof than that required to make out a simple cause of action on the claim. It may be true that if it were not for the provision in the express receipt requiring the filing of a written claim plaintiff's case would be complete upon the mere proof of unreasonable delay. However, when he seeks to avoid the requirement for the filing of a written claim he must go further and prove a *negligent delay.* As to the mere question of liability the plaintiff can claim the benefit of the presumption of negligence arising from the mere fact of delay but this presumption does not apply to the proof necessary to dispense with the filing of a claim as a condition precedent to recovery. The whole question is one of the burden of proof and it may well be that this is a possible explanation for the apparent discrepancy between claims where no notice of claim need be filed and those where it is required.

We do not contend that Congress necessarily had in mind the close legal question as to where the burden of proof would lie but we do contend that it actually had in mind the result which was brought about by the application of the usual legal rules of interpretation. What we think the framers of this exception had in mind was this: a carrier is practically an insurer of the merchandise delivered to it for carriage; as such it is

entitled to prompt notice of loss or damage in order to make a seasonable investigation; however, no carrier can be permitted to relieve itself from liability for its own negligence, by a requirement that claims must be filed within a certain time as a condition precedent to recovery. We believe that Congress may well have had the intention of differentiating between cases of insurance liability of the carrier where negligence is only imputed from the fact of damage or delay and liability based on actual proof of the carrier's negligence; that in the former case they intended to allow the carrier to impose certain technical requirements of notice whereas in the latter case they intended that no contract provision could bar a recovery.

In the present case the complaint is barren of any allegation of negligence on the part of the defendant and the plaintiff made no attempt at the trial to prove any negligence on the part of the defendant, his evidence being confined to proof of the most sketchy character that there had been an unreasonable delay in delivery of the shipment.

POINT III.

The defendant could not waive requirements lawfully inserted, in the uniform express receipt as conditions precedent to recovery, and its failure to affirmatively plead such provisions in its answer did not deprive it of the right to avail itself of such defense.

While the Appellate Division of the New York Supreme Court did not mention as a ground for

its decision the alleged waiver by the defendant of its right to avail itself of the plaintiff's failure to file a claim within four months from the time of delivery, this was the ground upon which the trial justice denied the defendant's motion to dismiss the complaint, and we feel that it should be answered. So far as we know there has been no decision of this Court squarely on the point, although the highest courts of several states have already held that the carrier could not waive the defense of the failure to file claim by negotiations with the claimant or by failure to properly plead such defense.

The theory upon which we base our contention is that the Interstate Commerce Act has created a special field of substantive law with reference to the conduct of carriers and shippers engaged in interstate commerce. This Court has repeatedly held that one of the fundamental purposes for which the Interstate Commerce Act was passed was to prevent the possibility of discrimination between shippers, and this principle has been rigidly enforced, although in some cases its application may have worked hardship and injustice to the particular shipper.

Pittsburgh, etc., Ry. Co. v. *Fink,* 250 U. S. 577;
Titus v. *Penna R. R.,* 216 N. Y. 17.

As we understand the law, every shipper is bound by the knowledge of the entire contents of the public filed classifications and tariffs, and it is illegal for the shipper and carrier by agreement, either at the time of shipment, to vary in any way from the service and rates prescribed

in such tariffs, or by conduct in connection with the handling of claims arising out of such shipments, to allow one shipper to evade the requirements of the tariffs with reference to the filing of claims or bringing suit. For this reason we say that all the old rules of the common law with reference to waiver and estoppel by carriers by continuing negotiations for the settlement of a claim or the failure to plead such a defense affirmatively when sued, cannot affect its right and duty to set up such defense. It is apparent at once that if a carrier can by its conduct waive the requirements for the filing of written claim, the door will be opened for discrimination of the grossest kind. Discrimination in favor of a particular shipper would be as real if there had been an actual rebate, while the manner of the commission of the offense would be such as would make it practically impossible to prove an intent to evade the Act. Under the circumstances, we submit that no matter what may have been the procedural requirements of the State of New York with respect to the pleadings of affirmative defenses, the defendant could not estop itself from urging on the trial every defense which it had to the plaintiff's claim under its published and filed classifications and tariffs. To hold the contrary would be to open the door at once to rebates and discrimination, and would nullify a long line of decisions of this Court prohibiting such practices.

It must be remembered that in the present case both the Cummins Amendment and the Uniform Express Receipt specifically made the filing of a claim "a condition precedent to recovery."

This Court said, in the case of *Georgia, etc. Railway* v. *Blish Milling Co.*, 241 U. S. 190:

> "It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. *Chi. & Alt. R. R.* v. *Kirby*, 225 U. S. 153, 166; *Kansas Southern Ry.* v. *Carl, supra; A. T. & S. F. Ry.* v. *Robinson*, 233 U. S. 173, 181; *Southern Ry.* v. *Prescott, supra.*"

So also this Court said in the case of *Texas & Pacific Rwy. Co.* v. *Leatherwood*, 250 U. S. 478, at page 481:

> "Leatherwood contends that the principle upon which the case was decided is not applicable here, because there the carriers sought to avail themselves of the second bill of lading, while here they seek to ignore it; and he insists that the carriers are, by their conduct, estopped from asserting its invalidity. As stated in *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197, the parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them. 'A different view would antagonize the plain policy of the

> Act and open the door to the very abuses at which the Act was aimed.' The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice. That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled.
>
> A carrier has, for instance, been permitted to collect the legal rate, although it had quoted a lower rate and the shipper was ignorant of the fact that it was not the legal rate."

In *Davis* v. *Henderson*, 44 October Term, 1924, Mr. Justice Brandeis, on October 27, 1924, said:

> "there is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff. *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197; *Missouri, Kansas & Texas Ry. Co.* v. *Ward*, 244 U. S. 383, 388; *Davis* v. *Cornwell*, 264 U. S. 560, 562."

In *Southern Railway* v. *Prescott*, 240 U. S. 632, it was held that the Federal rule as to the burden of proof would prevail although it might be contrary to state law. The law of the United States cannot be evaded by the forms of local practice.

Rogers v. *Alabama*, 192 U. S. 226; *American Railway Express* v. *Levee*, 263 U. S. 19.

In the following cases the Federal Courts have held that the giving of the notice of claim is a condition precedent to the right of the shipper to maintain an action and must be alleged in his complaint.

Metropolitan Trust Co. v. *T. St. L. & K. C. R. R.*, 107 Fed. 628;
The Westminster, 127 Fed. 680;
Clegg v. *St. L. & San Francisco R. R.*, 203 Fed. 971.

The highest courts of the following states have specifically held that the carrier could not waive its duty to take advantage of the claimant's failure to file a claim within the period prescribed in the bill of lading.

Bronstein v. *Payne*, 113 Atl. 648 (Maryland);
Hennington Produce Co. v. *American Ry. Ex. Co.*, 188 N. W. 272 (Minnesota);
Metsco v. *NB. & M. R. R.*, 116 N. E. 475 (Massachusetts);
Nashville V. & St. L. Ry. v. *Kamper*, 78 So. 925 (Alabama);
Harelson v. *St. L. & S. F. R. R.*, 191 S. W. 1068 (Missouri);
Olivit Bros. v. *Pennsylvania R. R.*, 96 Atl. 582 (New Jersey);
Houston, etc., Ry. v. *Houston Packing Co.*, 203 S. W. 1140 (Texas);
Stevens-Scott R. Co. v. *C. R. I. & P. Ry. Co.*, 221 Pac. 1116 (Kansas).

POINT IV.

The judgment of the Appellate Division of the Supreme Court of the State of New York should be reversed and judgment should be entered in favor of the defendant, dismissing the complaint with costs.

Respectfully submitted,

CHARLES W. STOCKTON,
Attorney for Appellant.

KENNETH E. STOCKTON,
Of Counsel.

IN THE

Supreme Court of the United States.

WILLIAM M. BARRETT, as President of the Adams Express Company,

Petitioner,

—against—

ARTHUR H. VAN PELT,

Respondent.

PETITIONER'S REPLY BRIEF.

Since the respondent has not attempted to answer Point III of the petitioner's brief, we must assume that he has conceded that the defendant could not waive the requirement for filing a claim within four months from the time of delivery, if such requirement was lawfully inserted in the Uniform Express Receipt.

Furthermore, the respondent practically admits that if construed according to its punctuation the proviso of the First Cummins Amendment in question must have the interpretation contended for by the petitioner.

Much of the respondent's brief consists of comments on excerpts taken from our main brief and our brief in support of the application for a writ of certiorari, apparently without regard to the context of the brief from which such excerpts were taken. We do not believe that this is quite fair or that the respondent has fully apprehended our point in the case of the excerpts quoted by

him and, without other comment on the respondent's obvious purpose in criticising our brief, rather than devoting himself to the proper construction of the law, we shall confine ourselves to a discussion of the points of law involved.

Respondent's Point III.

Taking up the discussion of respondent's points in inverse order, in his Point III he argues that "upon a showing of unreasonable delay, the burden is on the carrier to show a legal excuse for such delay, if he has one." Thereupon the respondent sets out a detailed statement of the facts in this case (from his point of view), apparently for the purpose of showing the aggravated nature of the delay in this case. While we made no point in our main brief on the question of the sufficiency of the evidence in this case, deeming this Court primarily interested in the Federal question, we cannot let the respondent's statement of the facts pass unchallenged.

In our opinion there was no evidence before the Court of an unreasonable delay. The only testimony upon this point is that of the respondent's attorney, to the effect that he had travelled by passenger train between New York and Louisville, Kentucky, in twenty-five or twenty-six hours (Record, p. 69). There was no attempt to show the time usually made by trains upon which carloads of eggs moving by express were or could be transported, and not even any testimony to show the usual time for a passenger to make the trip in February, 1918.

The movement in question was in February,

1918, during which period this country was in a state of war, and it is a matter of public knowledge, of which this Court will take judicial cognizance, that the conditions of public transportation were not the same as in normal times. The Government had only sixty days prior to the date of this shipment taken possession and control of all railroad transportation under proclamation of the President. An unreasonable delay is one which takes into consideration all of the existing conditions, especially those beyond the control of the carrier, and we submit that the respondent conspicuously failed to show an unreasonable delay.

However, the respondent fails to answer our contention that, even if there is proof of delay beyond a reasonable time, which would make a carrier liable in the absence of a defense based on a contractual requirement for the filing of a claim, the mere proof of such delay will not bring the claimant within an exception to the contractual requirement, limited to cases of delay due to the negligence or carelessness of the carrier. Our contention is that in order to avail himself of the benefit of the statutory exception, so limited, the claimant has a burden of proof to sustain which would be unnecessary in cases where he had filed a claim or where there were no such contractual requirements. If the plaintiff has filed his claim he need only prove a delay beyond a reasonable time for delivery in order to create a presumption of negligence on the part of the carrier, but if he has not filed a claim and seeks to avail himself of an exception to such requirement, he cannot avail himself of the presumption of negligence but must affirmatively prove the facts which bring his claim within the excepted class.

Respondent's Point II.

Respondent in his Point II cites one of the reasons given by petitioner in his application for a writ of certiorari, why this Court should grant the writ, *i. e.*, conflict of judicial opinion as to the proper interpretation of the First Cummins Amendment, and attempts to show by certain cited cases that no such conflict exists.

This amounts to an argument that the writ of certiorari issued by this Court should not have been granted. Since the writ *was* granted and the case is now up for argument upon its merits, it seems unnecessary to further discuss this point.

It is noteworthy that in the excerpt from *Gillette Safety Razor Co.* v. *Davis*, 278 Fed. 864, cited by the respondent as setting forth precisely his contention, the Circuit Court of Appeals for the First Circuit found itself obliged to take considerable liberties with the language of the Cummins Amendment. Its interpretation of the proviso in question, with its interpolations marked by parentheses, was as follows:

> "That if the loss, damage, or injury complained of was due to delay (in the delivery of such property) or (it was) damage (d) while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim, nor filing of claim, shall be required as a condition precedent to recover."

However, we believe that the learned Court was rather fitting the hand to the glove in working out such a rendering of the statute. If any in-

terpolation at all is necessary to make it grammatically intelligent, we believe that by merely inserting the obviously missing subject of the phrase "while being loaded or unloaded" the statute is made clear without the necessity of reading into it language which is not warranted by the bare wording of the act itself.

> "Provided, however, that if the loss, damage or injury complained of was due to delay or damage while (the shipment was) being loaded or unloaded, or (the shipment was) damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Respondent's Point I.

Coming to his principal (we might say only) point, respondent claims the construction placed on the first Cummins Amendment by the Court below is correct because it is inconvenient or impossible for the ordinary shipper to prove where the delay occurred or that it was due to the negligence of the carrier.

The main argument adduced by the respondent is that under the common law of New York the mere proof of delay in delivery beyond a usual and reasonable time was sufficient to create a presumption of negligence, and that the shipper should not have the burden of proving that the delay was due to negligence or that it occurred while the property was being loaded or unloaded.

In the latter case he claims that it is practically impossible for a shipper to ascertain and prove whether or not the delay of which he is complain-

ing came about in loading or unloading the shipment. This is true in the case of shipments of inanimate freight, but the respondent fails to take into consideration the historical fact that this Amendment was drawn by and adopted at the instance of shippers of *live stock*. The circumstances surrounding the shipment of live stock were at the time of the adoption of the Cummins Amendment, and still are, substantially different from those connected with the movement of inanimate freight.

Shipments of live stock were brought by the shipper to the loading pens of the railroad company and there held at the shipper's risk until the carrier provided and set at the pens the empty cars for their transportation. They were loaded into the cars by the shipper who then executed a live stock shipping contract and usually *sent his own attendants on the train in charge of the live stock*. The law forbade the transportation of live stock for a greater period than twenty-eight hours and the attendant in charge might require the carrier to place the cars at feeding stations to be unloaded for water, feed and rest. The live stock transportation contracts generally required claim to be filed in a very short period, five days being a not uncommon limit.

Thus we see that in the case of the live stock shippers, for whose benefit the Cummins Amendment was adopted, claims for delay while the shipment was being loaded or unloaded constituted an important classification and proof that the delay occurred at such time was a simple matter.

The respondent's contention that it is an injus-

tice and hardship to compel the shipper to affirmatively establish the negligence of the carrier or the point when the delay occurred is specious. In cases where he has promptly filed a claim there is no such burden thrown on the shipper. The rule requiring reasonable notice and filing of claims is eminently fair alike to shipper and carrier. It is only where the shipper has not done this that he must attempt to take advantage of the exception contained in the Cummins Amendment. If he is able to bring his claim within the terms of the exception he secures an inequitable and unjust advantage over the carrier because he is allowed to prosecute a claim of which the carrier has had no notice and which it has not been able to investigate. Such being the case, how can the respondent be heard to complain if it is inconvenient or difficult for him to prove the facts which bring his case within the exceptions contained in the Cummins Amendment? In the first place, he is attempting to get the benefit of an exception put in for the benefit of another kind of shipper, and in the second place, he is attempting to bring himself within an exception that gives him an unjust advantage over the carrier.

The respondent quotes an excerpt from a New York decision in which the learned Court states that in case of claims for delay resulting in loss of market value, there is no necessity for requiring prompt notice of claims. The invalidity of this statement is strikingly evidenced by the respondent's own admission (respondent's brief, p. 7), that a carrier is not an insurer against delay and claims for damages due to delay are predicated on *negligence*. In other words, if the car-

rier can show reasonable diligence in transporting the shipment, it is absolved from liability. In order to make the investigation which will establish the facts as to its diligence or lack of diligence in transporting the shipment the carrier must act promptly, while the transaction is still fresh in the recollection of its employees and its records are intact. In fact in the case of claims for loss of market value due to delay, where there is no physical damage, there is a peculiar need for prompt notice of claim. In cases of actual physical damage due to delay, it may be claimed that the carrier should take notice from the damaged condition of the shipment at the time of delivery that a claim is in prospect and that an investigation should be made. However, in delivering a shipment which is not physically damaged the carrier can not be charged with knowledge of a drop in market value during transit and unless claim is promptly made by the shipper it cannot prepare itself to defend or adjust the claim.

Respectfully submitted,

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Office Supreme Court, U. S.
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CLERK

upreme Court of the United States.

OCTOBER TERM, 1924.
No. 160.

ILLIAM M. BARRETT, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY, INC.,

Petitioner,

vs.

ARTHUR H. VAN PELT,

Respondent.

CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT, NEW YORK STATE, APPELLATE DIVISION, FIRST DEPARTMENT.

BRIEF FILED BY LEAVE OF COURT IN BEHALF OF AMERICAN RAILWAY EXPRESS COMPANY.

H. S. MARX,
A. M. HARTUNG,
Amici Curiae.

...Post Job Printing Office, Inc., 104 Fulton St., New York, N. Y.

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BRIEF FILED BY LEAVE OF COURT IN BEHALF OF AMERICAN RAILWAY EXPRESS COMPANY.

Statement.

The American Railway Express Company is a Delaware Corporation engaged in the interstate transportation of property by express throughout the United States, handling approximately 750,000 shipments per day. The claims for loss, damage, or delay to the shipments transported by it, average 500,000 per year, and the amount paid by it in satisfaction of such claims, averages in excess of $3,500,000 per year. A very large percentage of the shipments handled by it are made for the purpose of reaching early markets, and are peculiarly subject to claims for decline in market value growing out of delay in transit, and the Company, there-

fore, is directly interested, and will be materially affected by the determination of the question involved in this case, namely, whether claims *solely for decline in the market price* of commodities, *and not for physical damage* to the goods, growing out of alleged negligent delay in transportation, need not be filed within four months after the delivery of the property, under the following provision of the Uniform Express Receipt:

> "Except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; * * *"

This provision is drawn in accordance with a proviso in the so-called First Cummins Amendment to Section 20 of the Interstate Commerce Act (38 Stat. 1196-1197, Chap. 176, amending 24 Stat. 386, Section 20, as amended by 34 Stat. 593, 595, Section 7) reading as follows:

> "Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.*" (Italics ours.)

ARGUMENT.

POINT I.

Plaintiff's claim, being for monetary damages represented by a decline in the market value of goods resulting from alleged unreasonable delay in transportation, and not in physical damage to such goods, comes within the requirements of the claim provision of the Uniform Express Receipt.

The proviso in the First Cummins Amendment makes it unlawful to require the filing of claims within less than four months, and provides further:

> "That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Accordingly, the Uniform Express Receipt provides:

> "Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; * * *"

We interpret the provision in the Uniform Express Receipt to provide that claims in writing

are required to be filed within the specified time, except claims for loss, damage or injury due to:

(1) delay or damage while being loaded or unloaded,

(2) damaged in transit by carelessness or negligence.

A claim for delay resulting in *physical damage* to a shipment, caused by negligence, comes within the exception, "(2) damaged in transit by carelessness or negligence", and need not be filed within the time specified in the claim provision of the Uniform Express Receipt. "Damaged in transit" clearly contemplates *physical* damage to the property shipped; the phrase is not susceptible of any other construction. But a claim for damages *measured by the decline in the market price of goods* (and not for physical damage) due to alleged unreasonable delay in transit obviously is not due to "(2) damaged in transit by carelessness or negligence". The occasion for this distinction is readily apparent; physical damage to the shipment comes immediately to the notice of the carrier, no filing of claim is necessary; but the carrier has no knowledge at point of delivery of the time consumed in transportation nor whether there was any negligent delay in transit and no occasion for inquiry as to market prices. Hence the filing of claim for physical damage may justifiably be dispensed with, but the same considerations do not apply to claims solely for decline in market prices, due to alleged delay in transit.

The claim here in question is such a claim; there is no question of physical damage to the shipment; it is purely and simply a claim for a drop in the market price between the time when the shipment

should have been delivered in due course of transportation and the time when it was actually delivered; and under the provision of the Uniform Express Receipt must be made in writing within four months after delivery of the property.

The interpretation of the claim provision to provide that all claims are required to be filed within a specified time, except claims for loss, damage or ~~delay~~ INJURY due to: (1) delay or damage while being loaded or unloaded, or (2) damaged in transit by carelessness or negligence is based on a literal application of the language, with due regard to the punctuation employed; it is in accord with the rules of legal construction applying to the interpretation of exceptions and provisos; and is supported by the circumstances surrounding the adoption of the so-called First Cummins Amendment, as is clearly and forcibly demonstrated by the Brief of the Petitioner herein (pp. 6-17).

The apparent difficulty of the courts in the application of the clause grows out of their failure to consider the circumstances surrounding the enactment of the legislation, and of the purpose the Congress sought to accomplish. An examination of the records in the Senate, and in the House of Representatives, clearly discloses that the proviso was inserted at the request, and for the benefit of the live stock shippers (Petitioner's Brief, pp. 11 to 17). Live stock is peculiarly subject to delay and damage in loading at point of origin, in unloading at destination, and in loading or unloading at intermediate points which is frequently necessary to comply with the provisions of the Federal Twenty-Eight Hour Law (Act June 26th, 1906, Chapter 3594, Section 1, 34 Stat. 607), and to damage in

transit by negligence of the carrier. Applied as intended to live stock claims, the interpretation of the clause affords no difficulties. Applied to live stock claims it is clear, definite and logical, and wholly accomplishes the purpose intended when interpreted literally, and with due regard to the punctuation.

Owing largely to the lack of consideration of these circumstances, and to attempts to interpret the statute by changing its language and punctuation, the decisions of the Courts are not harmonious as to the meaning and effect of the proviso; some of them being in accord with the interpretation we contend for and others not.

The American Railway Express Company—in whose behalf this brief is filed—is engaged in the interstate transportation of property by express throughout the United States; it is directly and vitally interested in a correct and uniform interpretation of the provision for its guidance and protection in the handling of its claims; and we think it important and desirable to review and analyze the decisions to establish the correctness of the interpretation contended for, and the error of the State Court in this case, and of other courts in other cases, in adopting other interpretations.

The proviso was interpreted, as we interpret it, by the Supreme Court, Appellate Term, First Department of the State of New York, in Lissberger v. Bush Terminal Railroad Co., 197 N. Y. Supp. 281 (119 Misc. 691) (a court of inferior jurisdiction and not the highest court of the State). That action was brought to recover damages for delay in transit in the transportation of a carload of scrap

brass, shipped from Chicago, Ill., to New York City. The defendant pleaded the failure to file a claim within four months after the delivery of the property, as prescribed by the bill of lading in a provision identical with the one involved in this case. In holding that the claim was barred by this provision, the Court said at page 283:

> "* * * The contention of the plaintiffs that their claim comes within the excepted cases specified in the bill of lading so that they were not required to file any claim, is not well founded. An examination of the language of the bill, quoted above, shows clearly that the only cases in which notice is not required are (1) where the loss, damage or injury is due to delay or damage while being *loaded or unloaded;* and (2) where the shipment is '*damaged* in transit by carelessness or negligence.'"
>
> "The instant case does not fall within either of the two excepted cases. The plaintiffs did their own unloading, and no claim arises under the first class of cases. The second class of excepted cases, in which no notice is required to be filed, is clearly confined solely to claims for 'injury' to a shipment 'damaged in transit by carelessness or negligence' of the carrier."
>
> "In the instant case the claim is not one for damage in transit, but for delay in transit, and, therefore a claim must be filed within the prescribed time of four months after delivery, even though the delay may have been due to negligence."

Apparently it was likewise so construed by the Supreme Court of Georgia in Southern Railway Company *v.* Bunch, 109 Southeastern, 523.

The proviso has been similarly construed by the

Courts of numerous States in cases involving an entire or partial loss of shipments in transit.

Kahn *v.* Am. Ry. Express Co., 106 S. E. 126 (W. Va.);

St. Sing *v.* Am. Ry. Exp. Co., 111 S. E. 710 (N. C.);

Conover *v.* B. & O. S. W. Ry., 212 Ill. App. 29 (Ill.);

Cunningham *v.* Mo. Pac. Ry., 219 S. W. 1003 (Mo.);

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Hilbert *v.* Pa. R. Co., 120 Atl. Rep. 778 (Pa.);

Allen *v.* Davis, Director General of Railroads, 118 S. E. 614 (S. C.).

In St. Sing *v.* Am. Ry. Exp. Co., *supra*, it was held that a claim for absolute loss of goods in breach of the contract of carriage, presents a typical instance calling for the application of the contract stipulation, and does not come within the purpose or meaning of the proviso.

In Conover *v.* Baltimore & Ohio S. W. Ry., 212 Ill. App. 29, it was said:

> "Loss of grain from a car cannot reasonably be included in the exemption of 'loss, damage or injury * * * due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence'. It is necessary to prove that a claim in writing was made to the carrier, either at the point of delivery or at the point of origin of the shipment, within 4 months."

In Henningsen Produce Co. *v.* American Railway Express Co., 188 N. W. (Minn.) 272, which was a

suit against a carrier for the loss of a trunk, the Court said:

> "It (the plaintiff) now contends that it was not necessary to make a claim as a condition of recovery. Its argument is that the merchandise was lost in transit, and by negligence, and therefore the limitation does not apply. We are unable to take this view. The language of the Statute is plain. *Even when the merchandise is lost in transit by negligence the Cummins Amendment does not dispense with making a claim.*"

In Cunningham *vs.* Missouri Pacific R. R. Co., *supra,* a suit for partial failure to deliver cattle, and for bruising, injuring, and damaging the head of cattle delivered, the Court held the provision of the bill of lading for the filing of claim to be valid and with particular reference to the construction of the proviso stated at page 1005:

> "We find no case construing or applying this proviso. It cannot, however, be applied here, for the reason that plaintiff does not base his claim on delay or damage while his stock was being loaded or unloaded or on damage in transit by carelessness or negligence * * *"

In Hilbert *vs.* Pennsylvania R. R. Co., *supra,* a suit to recover the value of goods which the railroad company had failed to deliver to the consignee as required by the bill of lading, and after the goods were located the railroad company still refused to deliver the goods, the Court said with reference to the notice of claim provision at page 779:

> "Furthermore, the plaintiff here made no claim in writing against the carrier until nearly two years and six months after the date of shipment, and as the loss, damage, or injury complained of was not due to delay or damage

> while being loaded or unloaded, or damaged in transit by carelessness or negligence, her right of action was lost by failure to make such written claim within six months after a reasonable time for delivery, as the provision in the bill of lading to that effect is obligatory. (Citing cases.)"

The Appellate Division of the Supreme Court of the State of New York, for the First Department, whose decision is under attack here, construed the proviso included in the First Cummins Amendment to Section 20 of the Interstate Commerce Act, to prohibit a common carrier engaged in interstate commerce from requiring the filing of a claim within four months after the delivery of the shipment, for *monetary* damages growing out of alleged delay in the transportation of goods resulting in a decline in the market price and *not in physical damage to such goods*, and to prohibit a requirement in the express receipt for the filing of a claim, in such instances, on the ground that the so-called First Cummins Amendment made a double classification of claims, to wit: transit and non-transit claims, and forbade the carrier to require the filing of a so-called transit claim as a condition precedent to recovery; and permitted the carrier to require the filing of claims within a specified time only as to non-transit claims.

The error of the State Court in concluding that the proviso creates this double classification of claims, those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which it calls transit claims; and those for loss otherwise sustained, which it calls non-transit claims, apparently grew out of its failure literally to construe the proviso, its disregard of the punctuation, its lack of knowledge or of consideration of

the purpose Congress sought to accomplish by the statute, and the incorrect assumption that the claim provision in the Uniform Express Receipt was drawn by the carrier in derogation of the plaintiff's rights, in that respect falling into the same error as did the Court in Bell *v.* New York Cent. R. Co., 175 N. Y. Supp. 712, 714, the decision it relied upon as a precedent for the decision in this case.

Bell *v.* New York Cent. R. Co., *supra,* is clearly distinguishable and is not an authority for the decision in this case. In the Bell case, suit was brought to recover $286.20 damages to a shipment of pears which were unreasonably delayed in transit, *the car not properly placed for delivery, and several of the barrels and baskets containing the pears broken open and the contents crushed and bruised.* The defense in that case was that the suit was barred because not brought within two years, *and the Court held that defense to be valid.* The so-called "classification of claims" by the Court in its opinion into "transit" and "non-transit" claims may have been convenient for the purpose of the question there presented, but that case did not directly present the question of the meaning and effect of the proviso here under consideration, and the language of the court with reference thereto was purely *obiter dictum.*

The basis for its classification of transit and non-transit claims was not given and we can find none. The Court treated the provision, however, as one drawn by the carrier and used in derogation of the plaintiff's rights, and in this, it was in error for as we have shown the provision in the Uniform Express Receipt follows the language of the Statute (Act of March 4th, 1915, 38 Stat. 1196, Section 1), and the provision bears the specific approval of the

Interstate Commerce Commission in its order prescribing the form of the Uniform Express Receipt (Supplemental Order No. 18 of the Interstate Commerce Commission, April 2nd, 1917, Docket No. 4198, In the Matter of Express Rates, Practices, Accounts and Revenues, See 43 I. C. C. 510). The Cummins Amendment is in derogation of the common law and must be strictly construed (see pp. 6-8 of petitioner's brief); the provision in the Express Receipt was a part of a filed tariff, and had the force and effect of a statute; it could not be waived by the carrier; and the burden was upon the shipper to bring himself within the excepted cases for which no filing of claim was required (see pp. 26-31, Petitioner's Brief).

An analysis of the decisions of the Courts in a few other cases in which the proviso has been construed otherwise than as we have interpreted it, discloses that such constructions grow out of a failure similar to that of the Court in Bell *v.* New York Cent. R. Co., *supra,* literally to construe the Statute as punctuated, and that in nearly every instance the punctuation has been changed and/or letters or words added and/or omitted in an effort to make such construction more reasonable and in accord with the purpose Congress *may have had in mind,* and without reference to, or consideration of the proceedings in Congress, or of the origin or purpose of the legislation.

Thus in Hailey *v.* Oregon Short Line Ry., 253 Fed. Rep. 569, a decision by the Federal District Court in Idaho, heard on a demurrer to a special plea of the defendant setting up the defense that no claim was filed, the declaration alleged that animals shipped were damaged as the result of being "unnecessarily and carelessly held at Green River,

Wyo., for eight days, in the yards of the railroad company, without proper shelter and care, or proper facilities therefor", and "as a consequence of such delay and carelessness" the damage occurred. In other words, the facts admitted by the pleadings were that the animals were "delayed" and "damaged in transit by carelessness and negligence", bringing the case squarely within the words of the proviso, and the District Judge so held, stating at page 571 (whatever else the District Judge said about the Amendment was purely *obiter dicta*).

> "The damages claimed were not the result of delay or injury in loading or unloading the horses; they were *damaged 'in transit'*, as that phrase is ordinarily understood, and by the *carelessness and negligence* of the carrier, *if the averments of the complaint are true. The phrase 'carelessness and negligence' undoubtedly qualifies* 'damaged in transit'."

That was the point of the decision. It was unnecessary for the Court to go further, but he proceeds:

> "In the case of a claim for damages suffered in the loading or unloading of a shipment, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in some particulars the grammatical construction is manifestly defective, and, that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in other respects the structure were artistic, perhaps a different view should be taken; but under the circumstances it is thought we are warranted in entirely ignoring the comma after 'unloaded' or inserting it after 'transit'. In this view the proviso in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negli-

> gence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in there unloading it."

To give effect to this strained construction, it was necessary for the Court to ignore the comma after the word "unloaded" and insert it after "transit", which we submit is erroneous.

Upon proper analysis it is apparent that "negligence" is not the key word of the whole proviso; that negligence is material only where property is damaged in transit. If Congress had intended that carelessness or negligence of the carrier should excuse the filing of all claims for loss, damage or delay, it would have shortened and simplified the proviso to read:

> "Provided, however, that if the loss, damage or injury complained of was due to negligence, then no notice of claim, nor filing of claim shall be required as a condition precedent to recovery."

Congress did not so draw the statute. It specified certain exceptions to meet certain conditions it had in mind and it is not for the courts to extend the application of the statute.

So, too, in the case of Gillette Safety Razor Co. *v.* Davis, Director General, 278 Fed. 864. This was a suit for failure to deliver merchandise shipped from Boston to New York under the Uniform Express Receipt. Claim was not filed within four months after a reasonable time for delivery had elapsed, and it was held that plaintiff was not entitled to maintain the suit for that reason.

With reference to the contention that the loss or damage occurred while the merchandise was being unloaded and that, if so, under the terms of Section 7 of the Uniform Express Receipt and the proviso

of the First-Cummins Amendment, the plaintiff was entitled to recover in contract, without showing that the unloading was carelessly or negligently done and without proof of notice the Court said:

> "Reading the second above quoted proviso in connection with the language contained in the preceding provisions of the act, it is apparent that its true reading is:
>
> " 'That if the loss, damage or injury complained of was due to delay (in the delivery of such property) or (it was) damage(d) while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.'
>
> "Thus read it is clear that Congress intended by the language of the act that the carrier should be responsible for loss occasioned the consignee by the carrier's negligent delay, negligence in loading or unloading, and negligence in transit."

To effect such construction the Court found it necessary to interpolate after the word delay "(in the delivery of such property)," before the word damage "(it was)" add the letter (d) to the word "damage" and entirely to ignore the punctuation rather than to accept the language as it stood and to construe it as Congress had enacted the proviso and with due regard to the purpose it sought to accomplish. The carrier, however, was not in a position to attack that construction by the Court in that case since the decision was in its favor; the Court finding that the carrier was liable only in the case of negligence and that the circumstances did not authorize an inference of fault on the part of the defendant, and the plaintiff having

failed to introduce evidence from which such inference could be drawn the Court below did not err in holding that the defendant was without fault and affirmed a judgment of a lower court in favor of the defendant. The plaintiffs in that case applied to this Court for a writ of certiorari which was denied; 259 U. S. 587. The same Court subsequently adopted the same construction of the proviso in the case of American Express Company, Plaintiff in Error, *v.* Farmington Shoe Manufacturing Company, Defendant in Error, and an appeal has been taken by writ of error to this Court where it is now pending as No. 507, October Term, 1924.

Such constructions of the proviso fail to give force and effect to the proviso itself, and as we have urged, grow out of the addition or interpolation of words or letters not contained in the statute, and the alteration of the punctuation, or the denial of any consideration to such punctuation. We earnestly submit that the proviso as enacted:

> "Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

is clear and definite in prescribing that except as to claims for loss, damage or injury due to (1) delay or damage while being loaded or unloaded, and (2) damaged in transit by carelessness or negligence, the filing of claims within a specified time may be required; that claims for monetary damages growing out of alleged delay in transportation resulting solely in a decline in the market price of the ship-

ment, do not come within the excepted classes, and no claim having been filed within the time required by the provision of the Uniform Express Receipt, the claim is outlawed and judgment should be rendered in favor of the carrier.

Respectfully submitted,

H. S. MARX,
A. M. HARTUNG,
Amici Curiæ.

New York, N. Y., December 30th, 1924.

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Supreme Court of the United States

IN THE MATTER

of

The Petition of WILLIAM M. BARRETT, as President of the Adams Express Company,

Petitioner,

against

ARTHUR H. VAN PELT,

Respondent,

for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Department, to bring before the Supreme Court the case of Arthur H. Van Pelt,

Plaintiff-Respondent,

against

WILLIAM M. BARRETT,
as President of the Adams Express Company,

Defendant-Appellant.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

Statement of Facts.

This is a petition by the defendant-appellant for a writ of certiorari directed to the Appellate Division of the Supreme Court of the State of New

York for the First Department, to review the decision of that Court affirming a judgment in favor of the plaintiff for the sum of $3,545.65 for damages due to delay in the shipment of a car of eggs, a perishable food product. The car of eggs was delivered to defendant at Louisville, Ky., on February 23rd, 1918, and was not delivered to the consignee in the City of New York until March 4th, 1918.

The sole defense relied upon by the defendant upon which evidence was offered on the trial was that no claim had been filed with the defendant within four months after the delivery of the car of eggs to the consignee.

The judgment of the Trial Court was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York for the First Department in 205 N. Y. App. Div., 332, 335. Subsequently, the defendant made a motion in the Appellate Division for reargument, or for leave to appeal to the Court of Appeals of the State of New York, which was denied, and thereafter made a motion in the Court of Appeals for permission to appeal to that Court from the Appellate Division, which motion was also denied.

POINT I.

There is no conflict of judicial opinion as to the proper interpretation of the First Cummins Amendment to the Interstate Commerce Act.

The First Cummins Amendment was construed by the United States Circuit Court of Appeals, First Circuit, in *Gillette Safety Razor Co.* v. *Davis*, 278 Fed., 864 (application for writ of certiorari

denied by this Court June 5th, 1922); by the United States District Court for the Southern District of Idaho in *Hailey* v. *Oregon Short Line R. R. Co.*, 253 Fed., 569; by the highest court of the State of Missouri in *Hunt* v. *Hines*, 223 S. W., 798; by the Illinois Appellate Court for the Third District in *Conover* v. *Wabash R. R. Co.*, 208 Ill., 105, and in *Conover* v. *B. & O. S. W. R. R. Co.*, 212 Ill., 29, at pages 32 and 36; and, in addition to the present case, by the Appellate Division of the Supreme Court of the State of New York for the First Department in *Bell* v. *New York Central R. R.*, 187 N. Y. App. Div., 564, 566.

These cases are all in accord as to the proper construction of the First Cummins Amendment.

In *Gillette Safety Razor Co.* v. *Davis, supra*, the transaction out of which the suit arose took place between the plaintiff and the American Railway Express Co., when the latter was under Federal control. The District Court had found that the case, for the loss of which the action had been brought, had been received by the defendant for transportation from Boston to New York; that the goods reached the defendant's receiving platform in New York, from which they would, in the ordinary course of business, have been loaded on trucks for delivery to the consignee, but that they had been stolen from the platform before being placed upon the trucks; that at the time of the theft the goods were not being loaded or unloaded and that the theft was not due to negligence on the part of the defendant. The Circuit Court of Appeals in its opinion, among other things, said:

> "In the argument of the cause the plaintiff took two positions: (1) That the loss or damage occurred while the merchandise was be-

ing unloaded, and that, if so, under the terms of section 7 of the bill of lading and the proviso of the Act of March 4, 1915, the plaintiff was entitled to recover in contract without showing that the unloading was carelessly or negligently done and without proof of notice; and (2) that it is entitled to recover on the counts in tort for negligence, though no notice was given, it appearing that the defendant had received the goods for transportation and had failed to deliver them; that failure to deliver was not only presumptive evidence of negligence, but, in view of the state of the evidence, was conclusive proof of it.

"(1) The provisos of the Act of March 4, 1915, authorizing the provisions of section 7 of the bill of lading, read as follows:

> "'Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.' Comp. St. Sec. 8604 a.

"In the provisions of the act preceding the proviso a carrier, on receiving property for interstate transportation, is required to issue a receipt or bill of lading therefore and is made —"'liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier "'* * * to which such property may be delivered,' etc.

"Reading the second above quoted proviso in connection with the language contained in the preceding provisions of the act, it is apparent that its true reading is:

" 'That if the loss, damage or injury com-
"plained of was due to delay (in the delivery
"of such property) or (it was) damage(d)
"while being loaded or unloaded or dam-
"aged in transit by carelessness or negli-
"gence, then no notice of claim nor filing of
"claim shall be required as a condition pre-
"cedent to recovery.'

"Thus read it is clear that Congress intended by the language of the act that the carrier should be responsible for loss occasioned the consignee by the carrier's negligent delay, negligence in loading or unloading, and negligence in transit. In other words the liability imposed, where the required notice is not given, is for negligence, and as to these matters it differs in no material respect from the liability of a warehouseman, who is liable for negligence only."

In *Hailey* v. *Oregon Short Line R. R., supra,* the Court held that the comma after the word "unloaded" should be ignored or inserted after the word "transit," and that the shipper was relieved from giving notice of filing claims for damages which resulted from the carrier's negligence either in loading the shipment at the point of origin or in carrying out to the point of destination, or in their unloading it. The opinion of the Court so far as pertinent to the present case was as follows:

"I am inclined to the view that the basis of classification intended by Congress must be found in the phrase 'carelessness or negligence.' It is used in no other place in the entire section, and in the absence of some

ground for classification it appears to be not improbable that the legislative mind made a distinction between liabilities resulting from the carriers' negligence and those which rest upon a different basis, and accordingly declare that the carrier should not require notice of claims for damages arising out of its own negligence. While, for reasons which it is unnecessary to explain, we may be unable to assent to the wisdom or justice of denying to the carrier this right, such seems to be the intent of the proviso. So far as the facts in this case are concerned, the construction involves no lexical or grammatical difficulties. The damages claimed were not the result of delay or injury in loading or unloading the horses; they were damages 'in transit,' as that phrase is ordinarily understood, and by the carelessness and negligence of the carrier, if the averments of the complaint are true. The phrase 'carelessness and negligence' undoubtedly qualifies 'damaged in transit.'

"In the case of a claim for damages suffered in the loading or unloading of a shipment, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in some particulars the grammatical construction is manifestly defective, and, that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in other respects the construction were artistic, perhaps a different view should be taken, but under the circumstances it is thought that we are warranted in entirely ignoring the comma after 'unloaded' or inserting it after 'transit.' In this view the proviso in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negligence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in there unloading it."

In *Bell* v. *New York Central Railroad Company, supra,* the suit was to recover damages to a shipment of pears over the line of the defendant's railroad where the pears had been unreasonably delayed in transit and several of the barrels and baskets containing the pears, broken open and the contents crushed and bruised. The Court was called upon to construe a bill of lading promulgated pursuant to the First Cummins Amendment, and in construing the amendment, the Court in its opinion, said:

> "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to wit, (1) those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call non-transit claims. The Cummings Amendment permitted the carrier to require as a condition precedent to recovery the filing of a non-transit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims, it forbade the carrier to require the filing of a claim as a condition precedent to recover, but authorized a requirement that suit be instituted within two years,"
>
> * * * * * * *
>
> "It is obvious that the claim in suit is within the class which we have called for brevity the transit cases, and that, therefore, it is one for a loss, of which notice *is not required and for which a claim does not have to be filed in writing. Indeed, in such a case, a requirement for either notice of loss or filing a written claim would be illegal under the Cummins Amendment*" (pp. 566, 567). (Italics ours.)

In *Conover* v. *Wabash Railroad Co. supra,* the Court said:

> "It does not appear that the Cummins Amendment has been before the Courts of Appeal for construction; at least no authority is cited, and we have not been able to find any construing it, but the appellee is entitled to sue for and recover the damages caused by the delay and negligence of the appellant in transit without giving any notice of filing any claim as a condition precedent to recover for such damages."

The decisions in *Conover* v. *B. & O. S. W. R. R.* and *Hunt* v. *Hines, supra,* are to the same effect.

The petitioner cites as holding contrary to these decisions, the case of *Lissberger* v. *Bush Terminal,* 197 N. Y. Supp., 281, and the case of *Southern Railway* v. *Bunch,* 109 S. E. 523. As to this latter case, the petitioner states in his brief (p. 17), that the Court did not hand down any opinion with its decision. How can it be said, therefore, that this case is in conflict with the cases holding that the requirment of a notice of claim for delay is prohibited when it does not appear that the Cummins Amendment was before the Court for construction?

As to the case of *Lissberger* v. *Bush Terminal, supra,* that case was decided by the Appellate Term of the Supreme Court for the First Department of the State of New York, a court inferior to the Appellate Division. Its decision, in so far as it held that it was necessary to file a notice where the claim was for delay, was in conflict with the decision of the Appellate Division in *Bell* v. *New York Central R. R. Co., supra,* and at any rate was overruled by the decision of the Appellate Division in this case.

The provision of the first amendment to the Interstate Commerce Law, here under consideration, was amended by the Act of February 28th, 1920, C. 91, 41 U. S. Stat., 490, and as amended reads as follows:

> "Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise, a shorter period for giving notice of claims than ninety days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years, *such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice;* provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." (The italicized matter is the new matter added by the amendment to this provision.)

The petitioner in his brief (p. 16) says that

> "The present case is especially important in view of the fact that the Interstate Commerce Commission has now required the carriers to adopt a provision that 'suits for loss, damage or delay shall be instituted only within two years and one day after the date when the notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof.' "

This is the first time this claim has been made. In his brief submitted on the motion for leave to appeal to the Court of Appeals of the State of

New York, and also in his brief on the motion in the Appellate Division for leave to appeal to the Court of Appeals, after setting forth that this action was of great importance to both shippers and carriers, the statement made was that

> "This is especially true with reference to the present form of express receipts and bills of lading, which provide that suits for *loss or damage may be brought within two years after the carrier has declined the claim.*"

We do not know whether or not the Interstate Commerce Commission requires carriers to adopt the provision specified by the petitioner, but if it does, it is plainly in conflict with the amendment to the law as above set forth. This would not be the first time that it has misconstrued the Cummins Amendment, as will appear by the decision of this Court in *McCaull-Densmore* v. *Chi., Mil. & S. P. R. R. Co.*, 253 U. S., 97.

It is to be noted that the statement of the petitioner is that the Interstate Commerce Commission "has now required carriers" to adopt the provision it sets forth, not that the uniform express receipt contains any such provision. The fact is that the uniform express receipt now in use by the express company in the City of New York contains no reference whatever to the provision incorporated in 1920 in the Cummins Amendment to the Interstate Commerce Law that the period for institution of suits shall be "computed from the day when notice in writing is given by the carrier to the claimant" that the carrier has disallowed his claim in whole or in part. A reading of the amendment of 1920 shows very clearly that it is only as to cases where the law requires a claim to be filed

that the time for bringing suit has been extended until two years "after the carrier has disallowed the claim," namely, to what the Appellate Division of the State of New York in the case of *Bell* v. *New York Central Railroad Co., supra,* designated for brevity "non-transit cases," whereas, a claim for delay is what has been designated a "transit claim."

The petitioner states in his brief (p. 28):

> "On perusing the discussions in the House of Representatives and the Senate attendant upon the adoption of the First Cummins Amendment (Congressional Record, Volume 51, pp. 9616 to 9626, 9777 to 9783, Vol. 52, pp. 5446 to 5451) one is immediately struck with the fact that the illustrative cases used are confined practically entirely to shipments of live stock and that the hardships of the shippers which it was claimed the amendment would remedy were the hardships of live stock shippers."

It may be true as stated by the petitioner that in the discussions in Congress upon the adoption of the First Cummins Amendment, that the illustrative cases used were principally confined to shipments of live stock, nevertheless, such a perusal will show that these illustrative cases were used exclusively with reference to the practice of carriers in regard to released values, and that the only statement in those discussions having a reference to the present question was made in the House of Representatives and was to the effect that the proposed amendment here under consideration "abolished notice for loss, damage and liability except for theft."

The petitioner also states (p. 31):

> "The requirement that a notice of claim be filed within not less than four months from the time of delivery is perfectly reasonable. It is as reasonable in the case of a claim for delay as it is in the case of a claim for loss or damage. No argument can be advanced why a carrier should not be allowed to make such a requirement or why it should be expressly prohibited by statute."

In reply to this statement, we beg to quote from a decision of the Appellate Division of the Supreme Court of the State of New York in *Johnson* v. *M., K. & T. R. R. Co.*, 107 N. Y. App. Div., 375, where the Court, in an opinion by Mr. Justice Nathan Miller, said:

> "* * * the reason for requiring prompt notice of loss or damage to the property itself is apparent, for in such case it is obvious that prompt notice is required in order to enable the defendant to investigate the extent of the injury and the facts relative thereto, but in the case of a claim for damage to the shipper resulting from loss of market occasioned by delay, the carrier does not need to be promptly notified in order to ascertain the facts. The market quotations are preserved and can be ascertained at any time, and records must be kept by the different lines over which the property is transported, so that it should be possible at any time to ascertain the time of receipt by any given carrier and the delivery by it to the next succeeding carrier."

POINT II.

Upon showing an unreasonable delay, the burden is on the carrier to show a legal excuse if he has one, and in the absence of such excuse, the plaintiff is entitled to recover.

The petitioner says in his brief (p. 14):

> "The plaintiff claims that the provision of the First Cummins Amendment, passed March 4, 1915, made it unlawful for a common carrier to require the filing of written claims for delay. To this contention the defendant replies that the First Cummins Amendment, at most, prohibits the carriers requiring the filing of written claims in cases of negligent delay, that the burden of proof is on the shipper to prove such negligence, and this is not satisfied by the mere proof of the fact of delay beyond a reasonable time for delivery."

In the present case, the courts of the State of New York held that the plaintiff had established a sufficient *prima facie* case of unreasonable delay in the transportation of the car of eggs, as alleged in the complaint, and as the defendant offered no excuse for such delay, the plaintiff was clearly entitled to recover.

Ward v. *N. Y. C. R. R.*, 47 N. Y., 29;
Tierney v. *N. Y. C. & H. R. R. R.*, 76 N. Y., 305;
10 *Corpus Juris*, p. 301; and cases cited.

If there is any excuse for an unreasonable delay, such excuse is a matter wholly within the knowledge of the carrier, and it is incumbent upon the carrier to at least prove, if not to allege, such excuse. The Cummins Amendment does not change this common law requirement.

POINT III.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LAMAR HARDY,
Attorney for Respondent.

LOUIS C. WHITE,
Of Counsel.

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Supreme Court of the United States

WILLIAM M. BARRETT, as President of the Adams Express Company,
Petitioner,

against

ARTHUR H. VAN PELT,
Respondent.

BRIEF FOR RESPONDENT.

Statement.

This case is before the Court on a Writ of Certiorari to the Supreme Court of the State of New York to review an order of the Appellate Division for the First Department affirming a judgment of the Supreme Court, New York County, entered in favor of the plaintiff for the sum of $3,345.65. The action was brought to recover damages for loss in market value due to delay in the transportation of a carload of eggs, a perishable food product. The car of eggs was delivered to the defendant at Louisville, Kentucky, on February 23, 1918, and not delivered to the consignee in the City of New York until March 4, 1918.

The sole defense relied upon by the defendant, and upon which evidence was offered, was that no claim had been filed with the defendant within four months after the delivery of the car of eggs in the City of New York.

The Appellate Division of the Supreme Court of the State of New York, in affirming the judgment of the lower Court, held that the plaintiff had established a *prima facie* case, and that as a carrier is forbidden under the First Cummins Amendment to the Interstate Commerce Act to require the filing of a claim as a condition precedent to recovering damages for delay, the alleged defense was insufficient.

The petitioner contends that the decision of the Supreme Court of the State of New York is based upon an erroneous interpretation of the Federal Law; that the First Cummins Amendment at most prohibits carriers requiring the filing of written claims in cases of negligent delay; that the burden of proof is on the shipper to prove such negligence, and that this is not satisfied by the mere proof of delay beyond a reasonable time for delivery.

POINT I.

The construction placed on the First Cummins Amendment to the Interstate Commerce Act by the Court below is correct.

At common law, a common carrier is absolutely liable, where such liability is not limited by the contract, for all loss, damage or injury to property in its possession for transportation, except when occasioned by act of God or the public enemy. When such loss, damage or injury to the goods themselves is not due to either of the excepted causes, the question of *negligence is immaterial.* Not so as to damages due to delay in transportation. Unless a stipulated time for delivery is fixed by contract, the rule is that the carrier is bound to use reasonable diligence and care

in transporting, and *only negligence* will render the carrier liable.

The absolute liability of the carrier for loss, damage or injury to the goods themselves could, however, as a general proposition, be limited by contract between the parties, except where such loss, damage or injury was due to negligence, and in some of the States such contract could provide for exemption from liability even when such loss, damage or injury was due to negligence.

And so it had come to pass, Congress having enacted no law on the subject and State Courts following the decisions of their own highest Court and the lower Federal Courts in such States following the decisions of the State Courts, that the law applicable to interstate shipments by common carriers was not uniform. However, by the Carmack Amendment to the Interstate Commerce Act in 1906 (34 U. S. Stat., 584), all policies of the States in reference to interstate shipments by common carriers were superseded. That law provided that "no contract, receipt, rule or regulation" should exempt a common carrier from liability for loss, damage or injury. The law was thus made uniform, so far as interstate shipment was concerned, that it was against public policy to permit a carrier to exempt itself from liability for negligence.

The Carmack Amendment to the Interstate Commerce Act, however, imposed no restriction on the right of a carrier to require the filing of a claim as a condition precedent to recovering for loss, damage or injury and this Court, long prior to the enactment of that Amendment, had declared the requirement of such a notice valid.

As the Carmack Amendment superseded all

other laws on the subject, all State prohibitions, constitutional or statutory, against common carriers requiring the giving of a notice or the filing of a claim as a condition precedent to recovery were, after the passage of that Amendment, so far as interstate shipments are concerned, void and inoperative.

A form of receipt was in use by some carriers, which provided that "claims for loss, damage or delay must be made in writing to the carrier at the point of destination or at the point of origin within four months, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." This form of receipt had been agreed upon by certain carriers and shippers, and, on June 27, 1908, the Interstate Commerce Commission had recommended it for use among all carriers (*Matter of Bills of Lading*, 14 I. C. C. Rep., 346).

Provisions in shipping contracts, limiting the time within which suit might be brought, or providing that carriers should not be liable for damages unless a claim should be made within a specified time, had been repeatedly passed upon by this Court prior to the Amendment to the Interstate Commerce Act in 1915, and had been sustained or rejected, depending in each case whether the provision was or was not considered to be reasonable.

In the various forms of receipts in use, no distinction was made as to the requirement of filing a claim between claims for loss or damage due to negligence and those where the question of negligence was immaterial.

This Court having held in *Adams Express Co.* v.

Croninger, 226 U. S., 491, that, although a common carrier could not under the Carmack Amendment exempt itself from liability for its own negligence or that of its employees, the rigor of that rule might be modified by a fair, reasonable and just agreement with the shipper which did not include exemption from negligence, Congress in 1915 passed what is known as the First Cummins Amendment to the Interstate Commerce Act. That Amendment absolutely prohibited the making of any agreement which would operate to prevent a recovery of the full actual loss, damage or injury from the carrier; and further provided, as follows:

> "*Provided, further,* that it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise, a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years;
>
> "*Provided, however,* that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

This was the first legislation by which Congress undertook to regulate the period within which carriers could limit the time for giving notice of claims, for the filing of claims and for the institution of suits. The question is, did Congress have any classification in mind or is this provision as to filing claims a mere arbitrary division without any basis for the distinction as to the requirement.

The petitioner contends that the punctuation clearly indicates that it was intended that the ex-

ception to the authority permitting carriers to require the filing of claims should cover only two classes—first, claims for delay or damage in loading or unloading and second, claims for damage in transit by carelessness or negligence, and that these two general classes were marked off by commas. It says in its brief (p. 9):

> "If the word 'delay' has no relation to the phrase 'while being loaded or unloaded,' it is obvious that there was no reason for inserting a comma after the word 'unloaded.' If there had been no comma inserted after the word 'unloaded' or if there had been commas after both 'delay' and 'unloaded,' it would seem reasonable to assume that the draftsman of the bill intended that there should be three general classes of exceptions. The fact that he used a comma in one place and did not use it in an other would indicate that he had the definite purpose of marking off two general classes of claims, *i. e.* (1) delay or damage while being loaded or unloaded, (2) damage in transit."

If the petitioner is correct and the statute is to be construed by reference to the punctuation alone, the words "carelessness or negligence" in the second proviso of the amendment qualify the words "or damaged in transit" only and not the words "damage while being loaded or unloaded." If this be so, the carrier is authorized to require the filing of claims for damages alleged to be due to delay while in actual transit between the point of origin and the point of destination, but not for delay in loading or unloading whether due to negligence or not, or for damages to the property itself in loading or unloading whether due to negligence or not, or for damage to the property itself in transit when due to negligence.

A carrier, however, is not an insurer against delay and recovery for delay, whether in loading or unloading or in actual transit, can only be predicated upon negligence. This is so even if as a matter of form an action in damages sounds in contract as upon an implied agreement to deliver within a reasonable time.

> 10 *Corpus Juris*, pages 284, 285, and cases cited.

It follows, therefore, that if the words "carelessness or negligence" do not qualify the words "damage while being loaded or unloaded," the Statute purports to relieve a shipper from filing a claim for delay in loading or unloading, although he must prove negligence in order to recover, and also to relieve him from filing a claim as to physical damage to property in loading or unloading not due to negligence, although in such a case, the carrier is an insurer of the goods.

When property is delivered to a carrier for immediate transportation and nothing remains to be done by the shipper, it has always been the law that the liability of the carrier as such attached at once, and the reasonable time within which delivery must be made was to be reckoned from the time the goods were delivered to and accepted by the carrier. Whether the delay occurred at one stage of the transportation or another was of no importance. Must the consignor or consignee now ascertain after the goods have been delivered to and accepted by the carrier, just where the delay occurred in order to know whether he is required to file a claim or not?

The contention of the petitioner that the word "delay" has reference only to delay in loading or

unloading is a mere afterthought based on the clumsy wording of the proviso. On the trial the objection made was not that the evidence did not show that the delay had occurred in loading or unloading (where according to the petitioner no claim would be required), but simply and broadly that no claim had been filed, thus indicating that the contention then advanced was that the filing of a claim is a condition precedent to recovery in all cases of delay in transportation, whether in loading or unloading or in actual transit.

The absurdity of attempting to construe the statute by reference of the punctuation alone is shown by the statement of the petitioner in his brief on the application for the Writ (p. 29).

> "So far as the transportation of inanimate objects is concerned, it is clear that any exception as to damage while being loaded or unloaded is one that would be practically insignificant. If even such damage were of sufficiently common occurrence to make it worth while specifically to except from the general operation of the Act, it seems clear that it would, as a practical matter, be impossible ever to prove that an inanimate object, which was delivered in a damaged condition, had been injured while being loaded or unloaded."

If you substitute the word "delay" for the word "damage" in this statement the whole situation, as we see it, is made clear. How could a shipper prove that the delay was in loading or unloading and not in transit so as to make the provision as to the filing of a claim as a practical matter of any force or effect, if the petitioner is correct? The petitioner in its present brief abandons its former argument and admits that instead of being an argument in its favor that the former argument is

practically one against its contention. It now says (p. 11):

> "The plaintiff's best argument against construing the section as it reads, is the apparently insignificant classification that would be created by an exception referring to claims for 'delay * * * while being loaded or unloaded.' He can very plausibly urge that so far as the original shipper is concerned, the number of claims in which the damage is caused by delay in loading or unloading is small, and the number of cases where such damage can be proved to have occurred in this manner is even smaller."

The petitioner asserts, however, that the language under consideration was not put in the First Cummins Amendment for the benefit of the ordinary shipper, but that it was adopted solely for the benefit of live stock shippers. We are unable to find any justification for such conclusion in the discussions alleged to have taken place before the sub-committees of the Senate and House of Representatives, as set forth in the petitioner's brief. However, for the sake of argument, assuming that the language under discussion was put in the Amendment for the benefit of livestock owners, it is not understood why a shipper of livestock should be compelled to ascertain whether the delay was in loading or unloading, or in transit in order to ascertain whether or not he is compelled to file a claim. The duty and obligation of the carrier begins when the livestock is delivered into its pens,

> *Covington Stock Yards Co.* v. *Keith*, 139 U. S., 128,

and whether the delay occurred at one stage of

the transportation or another, the carrier, in the absence of a good excuse therefor, is liable for an unreasonable delay whether the shipment be of animate or inanimate objects.

It does not seem possible that Congress intended any such confusing and impracticable division as to the requirement of filing claims as that indicated by the punctuation.

The reason for permitting a carrier to require notice of claim for loss or physical damage does not apply in the case of loss of market value due to delay. As stated by the Appellate Division of the Supreme Court in *Johnson* v. *M., K. & T. R. R. Co.*, 107 N. Y. App. Div., 375:

> "* * * the reason for requiring prompt notice of loss or damage to the property itself is apparent, for in such case it is obvious that prompt notice is required in order to enable the defendant to investigate the extent of the injury and the facts relative thereto, but in the case of a claim for damage to the shipper resulting from loss of market occasioned by delay, the carrier does not need to be promptly notified in order to ascertain the facts. The market quotations are preserved and can be ascertained at any time, and records must be kept by the different lines over which the property is transported, so that it should be possible at any time to ascertain the time of receipt by any given carrier and the delivery by it to the next succeeding carrier." Followed in *Frey* v. *N. Y. Cent. & H. R. R. R. Co.*, 114 A. D., 747.

The provisions of the Cummins Amendment here under consideration, however, do not appear to have been directly passed upon by this Court.

In *Gooch* v. *Oregon Short Line R. R. Co.*, 258 U. S., 22, this Court had before it an agreement in

a drover's railroad pass, conditioning his right to recovery for personal injuries upon giving written notice of claim within thirty days after he had been injured. It was held that the provision was not in violation of the Cummins Amendment for the reason that the Cummins Amendment did not cover claims for personal injuries.

In a dissenting opinion, however, by Mr. Justice Clarke, which was concurred in by the Chief Justice and by Mr. Justice McKenna, it was stated:

> "In the matter of Bills of Lading, 29 I. C. C., 417, 419, and *in re* the Cummins Amendment, 33 I. C. C., 682, 691, the Interstate Commerce Commission says that, while the uniform Bill of Lading has long contained a four months' limitation for presenting damaged claims for freight, no effort has been made by carriers generally to enforce it, until the Croninger case was decided in January, 1913 (226 U. S., 491), but that in December of that year, they began to enforce it literally and thereby 'created multitudes of unjust discriminations.' *Only about one year of such enforcement was necessary to cause the enactment of the Cummins Amendment of March 4, 1915, which made an end to the matter where property was damaged in transit by negligence,* and in any case rendered a limitation of less than ninety days unlawful."

This would indicate that the three Justices concurring in this dissent were of the opinion that the filing of a claim could not be required after the enactment of the Cummins Amendment in any case founded on negligence, and a claim for unreasonable delay in transportation is such a case.

In its brief submitted in support of the application for a writ of certiorari, the petitioner set forth that the present case was especially important in

view of the fact that the Interstate Commerce Commission has now required the carriers to adopt a provision (p. 16):

> "That 'suit for loss, damage *or delay* shall be instituted only within two years and one day after the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part thereof.'"

In its present brief this statement does not appear. After calling attention to, and setting forth, the amendment to the Cummins Amendment in 1920, providing that the time for the institution of suits in certain cases should be "computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice," the petitioner says in its present brief (p. 20):

> "We believe that the spirit of this amendment and the purpose which it sought to accomplish was fair and just. However, it is apparent that where the carrier cannot require the filing of the claim for damage, the claimant's time to bring suit will be indefinitely extended until such time as he chooses to present his claim and have it acted upon by the carrier. * * *"

It is clear from a reading of the amendment of 1920 that this statement is not correct. Prior to the amendment of 1920 the carrier could require the filing of a notice of claim in not less than 90 days and the filing of a claim in not less than four months, except where the loss, damage or injury was based on negligence. In all cases, however, whether based on negligence or not, and whether, therefore, it could require the filing of a claim or

not, it could require the filing of suit in not less than two years. The amendment of 1920 simply extended the time for bringing suit until two years after the carrier has disallowed the claim, to those cases where the law required the filing of a claim, namely, to those not based on negligence, and as to those cases it could only be extended indefinitely in case the carrier indefinitely failed to give written notice of disallowance.

POINT II.

There is no conflict of judicial opinion as to the proper interpretation of the First Cummins Amendment to the Interstate Commerce Act.

The petitioner set forth, as one of the reasons why this Court should issue a writ of certiorari (p. 9):

> "(b) There has already been a conflict of judicial opinion as to the proper interpretation of the first Cummins amendment to the Interstate Commerce Act."

And Point II in its brief in support of the petition was to the same effect. The petitioner has apparently concluded that none of the cases cited in its former brief in any way sustained its contention with the result that no such claim is advanced in its present brief.

In the case of *Hunt* v. *Hines*, 233 S. W., 798, the highest Court of Missouri held that the First Cummins Amendment prohibited carriers from requiring the filing of written claims for delay in transportation. The Appellate Division, First Department, of the Supreme Court of the State of New

York, in *Bell* v. *New York Central R. R.*, 187 N. Y. App. Div., 564, and the Court of Appeals of Cook County, Illinois, in *Conover* v. *Wabash R. R. Co.*, 208 Ill. App., 105, held to the same effect.

In *Gillette Safety Razor Co.* v. *Davis*, 278 Fed., 864, the U. S. Court of Appeals, First Circuit, and in *Hailey* v. *Oregon Short Line R. R. Co.*, 253 Fed., 569, the U. S. District Court for the Southern District of Idaho, held that the classification intended by Congress in the First Cummins Amendment was based on negligence.

In *Gillette Safety Razor Co.* v. *Davis, supra*, the U. S. Circuit Court of Appeals for the First Circuit, said that it was apparent that the true reading of the proviso of the Cummins Amendment here under consideration is

> "That if the loss, damage, or injury complained of was due to delay (in the delivery of such property) or (it was) damage (d) while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim, nor filing of claim, shall be required as a condition precedent to recover."

This construction of the proviso is what the respondent is here contending for.

POINT III.

Upon showing an unreasonable delay the burden is on the carrier to show a legal excuse for such delay, if he has one.

The burden is on the shipper to show that the carrier has failed to deliver the goods within a reasonable time. When evidence of such an unreasonable delay is adduced, a sufficient *prima*

facie case of negligence is made out which adequately sustains the burden of proof the shipper has to assume. The burden is then on the shipper to explain the delay and to show that it arose from some cause other than its own negligence. If there is any excuse for an unreasonable delay, the facts in regard to such excuse are peculiarly within the knowledge of the carrier and it is incumbent upon the carrier to at least prove, if not to allege, the facts showing such excuse.

In this case the car of eggs was delivered to the express company at Louisville, Kentucky on February 23, 1918, and was not delivered in the City of New York until March 4, 1918. In other words, it took the express company nine days or two hundred sixteen hours to transport and deliver the car of eggs. The testimony shows that the ordinary traveling time for a passenger train between New York and Louisville is from twenty-five to twenty-six hours. The General Agent of the Adams Express Company reported under date of May 16, 1918 (Plaintiff's Exhibit D) that car #6083, which was the car in which the eggs were received in New York (Plaintiff's Exhibit E):

> "Out on Penna #307, February 23rd. We have no information as to any transfer being made of these cars. The same should have gone direct by Indianapolis to Pittsburg without transfer."

At what point the delay actually occurred, whether between Louisville and Pittsburg or between Pittsburg and New York, and whether or not such delay was due to an unavoidable accident or other good excuse, is something that the shipper could not possibly ascertain. And this is so as to the delay to any shipment.

The Appellate Division of the Supreme Court of the State of New York held that the plaintiff in the present case had established a sufficient *prima facie* case of unreasonable delay and as no excuse for such delay was offered by the carrier, the plaintiff was clearly entitled to recover.

> *Ward* v. *N. Y. C. R. R.*, 47 N. Y., 29;
> *Tierney* v. *N. Y. C. & H. R. R.*, 76 N. Y., 305;
> *10 Corpus Juris*, page 301 and cases cited.

If, however, the petitioner is correct and proof of an unreasonable delay does not make out a *prima facie* case of negligence and sustain the burden which the shipper must assume, then the effect of the provisions of the First Cummins Amendment to the Interstate Commerce Commission is to require the filing of a claim as a condition precedent to recover in all cases of delay, although a claim for delay is one based on negligence.

Again, assuming that the Statute is to be read as "delay in loading or unloading"; in such event no notice is required. The unreasonable delay is admitted here. The question then arises, where did the delay arise? Does the burden rest on plaintiff to prove that the delay did arise in loading or unloading, or does it rest on the carrier to show that it arose otherwise?

The plaintiff does not have to show the place of delay in order to establish negligence. Upon proof of an unreasonable delay he can rest on the presumption of negligence.

The Statute provides that in certain instances notice shall not be required as a "condition precedent." Impliedly, therefore, it may be required in other instances. The defendant claims the benefit

of the implication, but where is the proof that the delay arose other than in loading or unloading?

POINT IV.

The judgment of the Supreme Court of the State of New York should be affirmed.

Respectfully submitted,

LAMAR HARDY,
Attorney for Respondent.

LOUIS C. WHITE,
SELIG EDELMAN,
Of Counsel.

Counsel for Parties.

BARRETT, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY *v.* VAN PELT

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 160. Argued January 6, 1925.—Decided April 13, 1925.

1. The first Cummins Amendment, to § 20 of the Act to Regulate Commerce, concerning the duty of carriers to issue receipts or bills of lading for interstate freight and their liability for loss or damage, provides: "That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." *Held* that the words "carelessness or negligence" qualify the whole clause; "damaged" should be read "damage" and the comma after "unloaded" should be omitted. P. 87.
2. Thus read, carelessness or negligence is an element of each case of loss, damage or injury included in the clause, and in such case carriers are not permitted to require notice or filing of claim as a condition precedent to recovery. P. 91.
3. In an action against an express company for damages due to delay, the shipper, not having given notice and filed a claim, as required by the uniform express receipt, must prove the delay was due to the carrier's carelessness or negligence. P. 91.

205 App. Div. 332, reversed.

CERTIORARI to a judgment of the New York Supreme Court, Appellate Division, affirming a judgment for damages based on delay of an express company in transporting and delivering a carload of eggs.

Mr. K. E. Stockton, with whom *Mr. Charles W. Stockton* was on the brief, for petitioner.

Messrs. Selig Edelman and *Ralph Merriam* for respondent. *Messrs. Lamar Hardy* and *Louis C. White* were on the briefs.

Messrs. H. S. Marx and *A. M. Hartung* filed a brief as *amici curiae,* by special leave of Court.

Mr. JUSTICE BUTLER delivered the opinion of the Court.

February 23, 1918, at Louisville, Kentucky, respondent's assignor delivered to the Adams Express Company, a carload, consisting of 522 cases of fresh eggs, for transportation to New York City, there to be delivered to Harold L. Brown Company. The shipment was so delivered, March 4, 1918. This action was brought to recover damages for loss in market value due to delay in transportation. At the trial, respondent contended that the express company was bound to make delivery of the eggs within a reasonable time, which he claimed to be not more than 30 hours. It was shown that the price of eggs in New York declined between the time respondent claimed delivery to consignee should have been made and the time when it was made. The trial court directed a verdict in favor of respondent. A judgment was entered thereon. Petitioner appealed. It was affirmed by the Appellate Division. 205 App. Div. 332. Leave to appeal to the Court of Appeals of New York was denied. This court granted certiorari. 263 U. S. 697.

The case involves the construction of a provision of the Act of Congress of March 4, 1915, known as the first Cummins Amendment, c. 176, 38 Stat. 1196, 1197, amending § 20 of the Act to Regulate Commerce of February 4, 1887, c. 104, 24 Stat. 386, as amended by § 7 of the Act of June 29, 1906, c. 3591, 34 Stat. 593, 595. Chapter 176 requires any common carrier receiving property for transportation in interstate commerce to issue a receipt or bill of lading therefor, and makes it liable to the lawful holder thereof for any loss, damage or injury to such property, and contains certain provisos, the last two of which are: "*Provided further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation,

or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." At the time of the delivery of the property for transportation, the express company issued and delivered a receipt or bill of lading therefor, which contained the following: " Received from Ky. Creameries the shipment hereinafter listed, subject to the Classification and Tariffs in effect on the date hereof, which shipment the Company agrees to carry upon the terms and conditions of the Uniform Express Receipt in effect on date of shipment." Section 7 of the uniform receipt contains the following: " Except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." (Official Express Classification No. 25, filed May 18, 1917. I. C. C. A–2130.)

No claim was made or filed within four months after the delivery of the property to the consignee. We are required to decide whether the case is one where notice or filing of claim may be required as a condition precedent to recovery. If the first clause of the above quoted pro-

vision stood alone, the rule established would be clear. But the purpose of the second clause is to except some cases from the application of the general rule and to provide that as to them no notice of claim nor filing of claim shall be required. The language and structure of the second clause is so inapt and defective that it is difficult to give it a construction that is wholly satisfactory.* The Appellate Division held that the requirement of the receipt for the filing of claims within four months after delivery was prohibited by law, and was without force or effect. The court quoted from its opinion in *Bell* v. *New York Central Railroad*, 187 App. Div. 564, 566: "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to wit, (1) those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call nontransit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a nontransit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of a claim as a condition precedent to recovery but authorized a requirement that suit be instituted within two years." Respondent supports this construction. But we think it is not satisfactory. The language does not require such a classification. The court suggests no rea-

* See *Hailey* v. *Oregon Short Line R. Co.*, 253 Fed. 569; *Gillette Safety Razor Co.* v. *Davis*, 278 Fed. 864; *Conover* v. *Wabash Railway*, 208 Ill. App. 105; *Conover* v. *Baltimore & Ohio Southwestern R. Co.*, 212 Ill. App. 29; *Bell* v. *New York Central R. R.*, 187 App. Div. 564; *Henningsen Produce Co.* v. *American Ry. Express*, 152 Minn. 209; *St. Sing* v. *Express Co.*, 183 N. C. 405; *Cunningham* v. *Missouri Pacific R. Co.*, (Missouri) 219 S. W. 1003; *Lissberger* v. *Bush Terminal R. Co.*, 197 N. Y. S. 281; *Allen* v. *Davis*, (South Carolina), 118 S. E. 614.

son for such a division, and there seem to be no substantial considerations supporting it. Apparently, no effect is given the phrase, "by carelessness or negligence."

The petitioner contends that the word "delay" is to be read with "while being loaded or unloaded." This would make two classes of claims excepted from the general rule. One would include claims for loss due to delay or damage while being loaded or unloaded. The other would include those for damage in transit due to carelessness or negligence. But it is not apparent why claims for loss, damage or injury due to delay in transit should not be included in the same class as claims for damages due to delay while being loaded or unloaded. And no good reason is shown for the elimination of the element of carelessness or negligence from the definition of one class, while including it in the definition of the other.

It must be assumed that Congress intended to make the classification on a reasonable basis having regard to considerations deemed sufficient to justify exceptions to the rule. The element of carelessness or negligence is important. There are such differences between liability without fault and that resulting from negligence that Congress upon good reasons might permit carriers to require notice and filing of claim within the specified times where the carrier is without fault, and forbid such a requirement in the cases referred to where the loss results from the carrier's negligence. Notice and filing of claim warns the carrier that there may be need to make investigations which otherwise might not appear to be necessary; and if notice of claim is given and filing of claim is made within a reasonable time it serves to enable the carrier to take timely action to discover and preserve the evidence on which depends a determination of the merits of the demand. As to claims for damages not due to negligence, in the absence of notice, there may be no reason

for anticipating demand or to investigate to determine the fact or extent of liability. But as to damages resulting from carelessness or negligence, it reasonably may be thought that the carrier has such knowledge of the facts or has such reason to expect claim for compensation to be made against it that the carrier should not be permitted to exact such notice and filing of claim as a condition precedent to recovery. No other basis of classification seems as well supported in reason as the element of carelessness or negligence. And that basis is substantially sustained by the language of the clause. The elimination of the final " d " in " damaged " and the omission of the comma after " unloaded " would make the clause read as follows: " *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The context does not permit the use of the word " damaged " or allow any meaning to be given to it. Its presence makes a grammatical defect and embarrasses interpretation. It seems obvious that the word " damage " was intended. That word is in harmony with the context as well as with the probable intention of Congress. The final " d " may be eliminated. The intention of the law-maker constitutes the law. *Stewart* v. *Kahn,* 11 Wall. 493, 504. See *Smythe* v. *Fiske,* 23 Wall. 374, 380. Being satisfied of the legislative intention, the court will not be prevented from giving that intention effect by a too rigid adherence to the very word and letter of the statute. *Oates* v. *National Bank,* 100 U. S. 239, 244. Having found that the word " damage " was intended to be used, the court applies the rule that, "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter,

and a thing which is within the letter of a statute, is not within the statute, unless it is within the intention of the makers." *People* v. *Utica Insurance Co.*, 15 Johns. 358, 381; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212.

The comma after the word "unloaded" is not entitled to have any weight as evidence of the legislative intention as against the considerations supporting the extension of the qualifying effect of the words "by carelessness or negligence" to all claims referred to in the second clause. "Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning." *Chicago, M. & St. P. Ry.* v. *Voelker*, 129 Fed. 522, 527.

We hold that the second clause must be read as above indicated, that carelessness or negligence is an element in each case of loss, damage or injury included therein, and that, in such cases, carriers are not permitted to require notice of claim or filing of claim as a condition precedent to recovery. See *Hailey* v. *Oregon Short Line R. Co.*, 253 Fed. 569.

No notice of claim having been given and no claim having been filed as required by the uniform express receipt, it was incumbent upon the respondent to show loss, damage or injury due to delay by carelessness or negligence of the company. The carload of eggs was delivered to the company at Louisville, February 23, and was delivered by the company to the consignee at New York, March 4. It was shown that the car was taken out of Louisville, February 23, on a train of the Pennsylvania Railroad Company, and that it should have gone to Pittsburg without transfer. There was no other evidence in respect of the intended or actual movement of the car. There was evidence tending to show that the ordinary time of a passenger train on the Pennsylvania Railroad

between Louisville and New York was 25 or 26 hours. But there was no evidence that such shipments usually moved, or that this shipment could have moved, on any train making that time, or to show the time usually made by trains upon which such shipments were or could be moved. There was no evidence to show what was the customary or usual time for the transportation and delivery of such shipments. The trial judge held that such reasonable time was not more than 30 hours. We think the evidence was not sufficient to sustain that finding or to show what was a reasonable time for such transportation and delivery. It follows that there was nothing to give rise to any inference or presumption that failure to deliver at destination within 30 hours was due to negligence or to support a finding that there was any loss or damage due to delay caused by carelessness or negligence of the company. The evidence of market value of such eggs in New York City was as follows. February twenty-fifth, 53 cents per dozen; February twenty-sixth, 52 to 53 cents; March first, 36 cents; March second, 35.5 to 36 cents; March fourth, 36.5 cents. The eggs in question were sold March 4,—some for 35 cents, some for 35.5, and the rest for 36.5 per dozen. There was no evidence of market value at any other time. The court directed a verdict in favor of respondent for $3,396.26, the difference between the amount for which the eggs were sold March 4 and their value calculated at 53 cents per dozen, the price prevailing February 25, with interest. The date when the eggs should have been delivered to consignee and the market value at that time were essential to respondent's case. In the absence of either, the amount of the loss, if any, cannot be determined. The judgment given cannot be sustained.

Reversed and remanded for further proceedings not inconsistent with this opinion.

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